THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1995 CUMULATIVE SUPPLEMENT

Volume 1

Chapter 1

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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Preface

This Cumulative Supplement to Volume 1 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapter 1 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
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Legal Periodicals. —

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

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For comment on Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action, see 26 Wake Forest L. Rev. 1245 (1991).

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Section 1-50(5) and this section are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

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In general a cause of action accrues, etc. —

In accord with first paragraph in original. See Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

An action based on personal injury must be commenced within three years of the date on which the claim accrued. For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

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Co. v. American Mut. Liab. Ins. Co., 89 N.C. App. 299, 365 S.E.2d 677 (1988).

As to the effect of former subsection (b), etc. —

Former subsection (b) of this section, providing that except where otherwise provided, a cause of action, other than one for wrongful death or one for malpractice, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, would be deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief, was not applicable to claims arising out of a disease. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

Former subsection (b) had no application to claims arising out of disease. Leonard v. Johns-Manville Sales Corp., 316 N.C. 84, 340 S.E.2d 338 (1986).

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Applied in Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Schneider v. Brunk, 72 N.C. App. 560, 324 S.E.2d 922 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); Byrd v. Hancock, 86 N.C. App. 564, 358 S.E.2d 557 (1987); Webster v. Powell, 98 N.C. App. 432, 391 S.E.2d 204 (1990); Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993), cert. denied, 339 N.C. 736, 454 S.E.2d 646 (1995).

Stated in Cheek v. Poole, 98 N.C. App. 158, 390 S.E.2d 455 (1990).

Cited in Black v. Littlejohn, 67 N.C. App. 211, 312 S.E.2d 909 (1984); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180 (1986); Bockweg v. Anderson, 96 N.C. App. 660, 387 S.E.2d 59 (1990); Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 107 N.C. App. 110, 418 S.E.2d 529 (1992); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993); Aetna Cas. & Sur. Co. v. Anders, 116 N.C. App. 348, 447 S.E.2d 504 (1994).

II. MALPRACTICE.

Legislative Intent. — The General Assembly, by including separate discovery provisions for both nonapparent injury and foreign objects and retaining the 10-year outer limit for discovery of foreign objects rather than reducing it to four years intended that claimants be given the maximum opportunity in delayed discovery situations to pursue their cause of action subject to the outer time limits in the statute. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

The legislature's adoption of an outer limit or repose of four years from the last act of the defendant giving rise to the cause of action for nonapparent injuries and 10-year period of repose for discovery of foreign objects clearly have the effect of granting a defendant an immunity to actions for malpractice after the applicable period of time has elapsed. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Bodily "injury," as used in the one-year-from-discovery provision of subsection (c), denotes bodily injury resulting from wrongful conduct in a legal sense. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

The malpractice statutes of limitations provide an absolute statutory outer limit. This outer limit is more precisely referred to as a period of repose. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Purpose of Subsection (c). —

The legislature passed subsection (c) specifically to address the question of when an action for medical malpractice would be barred by time. Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987).

Effect of Subsection (c). —

Although the statute of limitations set out in subsection (c) of this section begins to run at the time of the last negligent act or breach of some duty, and not the time actual damage is discovered or fully ascertained, this statute still requires, as an element of the cause of action for malpractice, that plaintiff suffer some loss or injury, whether it be apparent or hidden. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

Although subsection (c) extends the limitations period where the discovery of an injury is delayed, this extension was not intended to defeat the outer time limit of four years from the defendant's last act. Mathis v. May, 86 N.C. App. 436, 358 S.E.2d 94, cert. denied, 320 N.C. 794, 361 S.E.2d 78 (1987).

Applicability Contingent on Performance or Failure to Perform Professional Services. — Section 1-15(c) applies to all claims of malpractice, not just medical malpractice. However, in order for this statute to apply, there must first be a performance of or failure to perform professional services. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Subsection (c) of this section establishes two separate grounds for malpractice: (1) malpractice arising out of the performance of professional services; and (2) the failure to perform professional services. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Subsection (c) is broad enough to encompass professionals other than those in health care. However, the statute does not mean that all persons labeled "professionals" necessarily fall within its ambit. The North Carolina Professional Liability Study Commission wanted the statute to include some, but not necessarily all, professionals other than "health care providers." The Legislature intended the statute to apply to malpractice claims against all professionals who are not dealt with more specifically by some other statute. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Professional Services. — The rendering of "professional services" as that term is set forth in this section necessarily includes those services where a professional relationship exists between plaintiff and defendant, such as a physician-patient or attorney-client relationship. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Where the Red Cross did not treat or care for plaintiff in any way other than to initially take and process the blood which was transfused into him, no professional relationship existed. The Red Cross did not render professional services to him as that term is used in subsection (c) of this section. As such, the action was not one for malpractice, and as a result, the 4-year statute of repose in subsection (c) of this section did not apply to bar plaintiff's claim. Rather, the action was subject to the personal injury statutes of limitations found in § 1-52(5), (16). Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Accrual of Cause of Action for Actions and Omissions. — This section provides that for both actions and omissions, the cause of action accrues and the statute of limitations begins to run at the time of defendant's last act giving rise to the cause of action. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Where plaintiff suffered injury after falling from a gurney, the statute of limitations accrued on the date of the fall, although plaintiffs were told by hospital personnel that there was not and would not be any brain damage or injury. Hussey v. Montgomery Mem. Hosp., 114 N.C. App. 223, 441 S.E.2d 577, cert. denied, 336 N.C. 605, 447 S.E.2d 393 (1994).

The continued course of treatment doctrine applies to situations in which the doctor continues a particular course of treatment over a period of time. When the injurious consequences arise from a continuing course of negligent treatment, the statute does not ordinarily begin to run until the injurious treatment is terminated. The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician or surgeon in continuing and repeating the wrongful treatment. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Because the "continuing course of treatment" doctrine affects determination of the accrual date, and the accrual date under subsection (c) of this section is the starting date for the running of the statute of limitations and statute of repose, it is correct to use the "continuing course of treatment" doctrine to determine the starting date for the running of the statute of repose. It is only by using the doctrine that a court can determine defendant's relevant "last act." Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990).

Where, following surgery, defendant continued to provide treatment for the same injury over a period of six months, culminating in plaintiff's last visit on June 24, 1981, plaintiff had until June 24, 1984 in which to file an action for malpractice under the continued course of treatment rule. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Letter to Patient Did Not Qualify as Continuing Relationship. — Physician's letter to a patient upon whom he had performed surgery, indicating the need for the removal of a foreign object, did not qualify as a "continuing relationship" under the continuing treatment doctrine, when the letter was written five years after the last physician-patient contact and which letter was prompted by a chiropractor's suggestion of an abnormality in the surgical area. Hensell v. Winslow, 106 N.C. App. 285, 416 S.E.2d 426, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Neither Did Visits to Emergency Room. — Plaintiff's diversity-based medical malpractice action against a hospital for damages she suffered after the hospital allegedly withheld an X-ray report from plaintiff and her family physician was barred by the statute of limitations because plaintiff discovered the hospital's failure to report the X-ray within two years of the date the X-ray was made, such that plaintiff could not avail herself of the extension of the filing period conferred as a result of latent injuries. Furthermore, plaintiff failed to show how her unscheduled visits to the emergency room represented an ongoing relationship to advance the treatment of her asthma. Conner v. St. Luke's Hosp., 996 F.2d 651 (4th Cir. 1993).

Applicability of Latent Injury Discovery Rule. — For a plaintiff to avail himself of the one year extension under the latent injury discovery rule, he must show that: (1) the injury of economic loss originated under circumstances making the injury or loss not readily apparent at the time of its origin; (2) the injury or loss was discovered or should reasonably have been discovered by the plaintiff two or more years after the occurrence of the last act of the defendant giving rise to the cause of action; (3) suit was commenced within one year from the date discovery was made; and (4) the statute of limitations may not, in any case, have been reduced to below three years or extended beyond four years. Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd, 312 N.C. 488, 322 S.E.2d 777 (1984).

Plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant on plaintiff qualified as discovery of a nonapparent "injury" that comes within the one-year discovery provision of subsection (c). Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Where plaintiff was shown an x-ray by her chiropractor which revealed the presence of a drain in her body left over from her prior plastic surgery, and where the chiropractor made plaintiff aware of the potential for severe illness or death if the drain remained, and he advised plaintiff to contact her plastic surgeon to have the drain removed, plaintiff was made aware, not only that a foreign object was present in her body, but that it was due to wrongful conduct, sufficient to run the one-year statute of limitations. Hensell v. Winslow, 106 N.C. App. 285, 416 S.E.2d 426, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was subsection (c) of this section, rather than § 1-52. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Malpractice Claim Barred. —

Malpractice complaint filed on November 20, 1992, was barred by the statute of repose where the last alleged negligent act of the defendants giving rise to this cause of action occurred in 1982 and plaintiff could not prove later treatment. Sidney v. Allen, 114 N.C. App. 138, 441 S.E.2d 561, petition denied as to additional issues, 338 N.C. 670, 453 S.E.2d 182 (1994), aff'd, — N.C. —, 459 S.E.2d 237 (1995).

Malpractice action against attorney for alleged negligence in failing to procure the transfer of a lot was barred by subsection (c), where plaintiffs did not institute their action within three years of the negligence; action for a separate act of negligence in procuring a deed to the lot from individuals who had filed for bankruptcy, was filed within three years of the negligent act and was not barred. McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852 (1995).

Statute Not Tolled by Appeal of Underlying Actions in Legal Malpractice Case. — In a legal malpractice case, where lawyer's last act in the underlying action was when default judgment occurred, and another lawyer took over the case and appealed the judgment, subsection (c) barred plaintiff insurance company's action for legal malpractice since plaintiff's cause of action accrued and the limitations period began to run no later than the date of the default judgment and the statute was not tolled by the appeal of the underlying action. Nationwide Mut. Ins. Co. v. Winslow, 95 N.C. App. 413, 382 S.E.2d 872 (1989).

Statute Tolled by Voluntary Dismissal Provisions. — Plaintiff's claims for medical malpractice were not barred by the three-year statute of limitations of subsection (c) where the refiling of the original state court action in a federal district court invoked the "savings" provision of § 1A-1, Rule 41(a)(1), pertaining to voluntary dismissal, and thereby tolled the limitations period. Porter v. Groat, 713 F. Supp. 893 (M.D.N.C. 1989).

Fraud by Attorney Not Included. — Because claims arising out of the performance of or failure to perform professional services based on negligence or breach of contract are in the nature of malpractice claims, they are governed by subsection (c); however, fraud by an attorney is not within the scope of professional services and thus cannot be "malpractice" within the meaning of this statute. Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792, cert. granted, 336 N.C. 317, 445 S.E.2d 397 (1994).

Limitation for Wrongful Death Action Not Extended. — Subsection (c) of this section would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to § 1-53(4). King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Appointment of Guardian Has No Effect on Tolling Provision. — Appointment of a guardian for a minor does not render the tolling provisions of § 1-17(b) inapplicable to the minor; therefore, where guardian was appointed for minor, and action on behalf of minor for medical malpractice was filed more than five years after that appointment but before minor reached 19, the cause of action was not barred by the statute of limitations. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Minor as Claimant in Malpractice Suit. — A claimant in a professional malpractice case must file the action within the time limitations contained in subsection (c), unless that period expires before the claimant reaches 19 years of age, in which case, claimant may bring the action at any time before he or she reaches age 19, pursuant to § 1-17. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

A cause of action involving malpractice in tax matters does not accrue until the I.R.S. assesses a deficiency. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, appeal dismissed and cert. denied, 312 N.C. 85, 321 S.E.2d 899 (1984).

Dismissal Improper in Legal Malpractice Action. — In plaintiff's action for legal negligence, question as to when last wrongful act of the defendant occurred was at issue; therefore, the action was improperly dismissed pursuant to Rule 12(b)(6). Southeastern Hosp. Supply Corp. v. Clifton & Singer, 110 N.C. App. 652, 430 S.E.2d 470 (1993).

§ 1-15.1. Statutes of limitation and repose for civil actions seeking to recover damages arising out of a criminal act.

(a) Notwithstanding any other provision of law, if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose, except as established herein, are tolled for the period set forth in this subsection for purposes of any civil action brought by an aggrieved party against that defendant for damages arising out of the offense for which the defendant was convicted. Any statute of limitation or repose applicable in the civil action shall be tolled from the time of entry of the court order

(1) Requiring that restitution be made,
(2) Making restitution a condition of probation or special probation, or
(3) Recommending that restitution be made a condition of work release or parole,

and until the defendant has paid in full the amount of restitution ordered or imposed. Provided, however, in no event shall an action to recover damages arising out of the criminal offense be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

(b) In any civil action brought by an aggrieved party against the defendant for damages arising out of the offense for which the defendant was convicted:

(1) The defendant has the right to contest the amount of damages;
(2) The amount of any restitution ordered or imposed shall not be admissible into evidence; and
(3) All restitution paid by the defendant to the aggrieved party shall be credited against any judgment rendered in the action against that defendant.

(c) This section shall not apply if the offense of which the defendant was convicted was an offense established in Chapter 20 of the General Statutes.

(d) A plea of no contest shall be considered the same as a conviction for purposes of this section. (1989, c. 535, s. 1.)

Editor's Note. — Session Laws 1989, c. 535, s. 2 made this section effective October 1, 1989, and applicable to claims for relief arising on or after October 1, 1989.

§ 1-17. Disabilities.

(a) A person entitled to commence an action who is at the time the cause of action accrued either

(1) Within the age of 18 years;
(2) Insane; or
(3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action within the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years. (C.C.P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C.S., s. 407; 1971, c. 1231, s. 1; 1975, c. 252, ss. 1, 3; 1975, 2nd Sess., c. 977, s. 3; 1987, c. 798.)

Editor's Note. — Session Laws 1987, c, 798, which amended subsection (a), was effective October 1, 1987, and was applicable to causes of action arising on or after that date.

CASE NOTES

Applicability of Section to Other Chapters. — The applicability of this section is not limited to the statutes of limitation found in Chapter 1 of the North Carolina General Statutes. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

The six-month period of limitation of § 30-2 for dissenting from a will in probate is a statute of limitations which can be tolled by this section for a disability. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

The six-month limitation period in § 29-19(b), relating to notice of the claim of an illegitimate child to take from his father's estate, is a statute of limitation which is subject to being tolled under the provisions of this section. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applicability to Products Liability Actions. — The clear and explicit intent of the legislature, as evidenced by the statutory language of the Products Liability Act itself, is to allow the statute of repose to be tolled if this section applies. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Section 1-15(c) and subsection (b) of this section must be construed in pari materia. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Post-Traumatic Stress Syndrome. — Plaintiff's repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse rendered plaintiff "incompetent", thereby tolling the statute of limitations so that summary judgment for defendant was improper. Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50, cert. granted, 337 N.C. 801, 449 S.E.2d 571 (1994).

Test of Disability. — Although the disability statute which operates to toll the statute of limitations, subsection (a) of this section, provides for tolling for persons who are "insane" when their "cause of action" accrues, under the decisional and statutory law of this state, the appropriate test is one of mental competence to manage one's own affairs. Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608, cert. denied, 317 N.C. 702, 347 S.E.2d 38 (1986).

This section does not completely eviscerate the statute of repose in the case of minors and others under disability. If a product is over six years old at the time of injury, which would be the time that the claim accrues, than the statute of repose operates as a total bar on that claim; however, if a claim accrues before the six year statute of repose has expired, this section simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B. Therefore, claims accruing after six years will still be barred. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Education of Handicapped Act. — Where mentally handicapped woman reached age 18 on February 9, 1984, and her guardian ad litem filed suit against the Board of Education in 1986 seeking reimbursement for the depletion of her health insurance benefits used to pay for her education under the Education of the Handicapped Act, the handicapped woman's cause of action was not time barred as she timely filed after attaining her majority and having a guardian appointed; district court properly found § 1-52(2) was tolled by handicapped woman's infancy and incompetency pursuant to this section. Shook ex rel. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989), cert. denied, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1069 (1990).

Appointment of Guardian Has No Effect on Tolling Provision. — Appointment of a guardian for a minor does not render the tolling provisions of subsection (b) inapplicable to the minor; therefore, where guardian was appointed for minor and action on behalf of minor for medical malpractice was filed more than five years after that appointment but before minor reached 19, the cause of action was not barred by the statute of limitations. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Running of Statute Against Beneficiaries When It Runs Against Trustee. — Where a trust has a claim against a third party, and the trustee is competent to sue, a statute of limitations will be deemed to have run against all beneficiaries, regardless of minority, when it has run against the trustee. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Running of Statute Against Minor Beneficiaries When it Runs Against Administratrix. — Where the statute of limitation had run against the administratrix, it had also run against the minor beneficiaries of a wrongful death settlement. Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994), cert. granted, 339 N.C. 609, 454 S.E.2d 246 (1995).

Tolling of Statute in Action by Beneficiary Against Trustee. — An action against a trustee for breach of fiduciary duty is a claim of the beneficiary, not the trust, and common provisions, such as this section, for the tolling of the statute of limitations are available to a beneficiary in an action against his trustee. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Tolling of Statute for Incompetent Widow. — Where widow was incompetent and without a guardian at all times during the administration of her husband's estate all statutes of limitations for civil actions under Chapter 1 of the General Statutes applicable to her were tolled by this section until the removal of her disability or the appointment of a guardian. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

A claimant in a professional malpractice case must file the action within the time limitations contained in § 1-15(c), unless that period expires before the claimant reaches 19 years of age, in which case claimant may bring the action at any time before he or she reaches age 19. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Stated in Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983).

Cited in Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983); Vaughan v. Moore, 89 N.C. App. 566, 366 S.E.2d 518 (1988).

§ 1-21. Defendant out of State; when action begun or judgment enforced.

CASE NOTES

I. In General.
II. Causes of Action Arising Outside State.

I. IN GENERAL.

This section is not applicable if a defendant is subject to long-arm jurisdiction. Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

Personal jurisdiction over defendants under § 1-75.4, standing alone, is not sufficient to place plaintiff's action outside this section. Plaintiff must also be a resident of this State at the time his action originally accrued in order to maintain an action in the courts of this State which is barred by the laws of the jurisdiction in which it arose. Glynn v. Stoneville Furn. Co., 85 N.C. App. 166, 354 S.E.2d 552, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987).

Burden of proof, etc. —

Where plaintiff's affidavits did not even suggest that defendant left North Carolina at any time, this section could not apply. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Cited in Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128 (W.D.N.C. 1991).

II. CAUSES OF ACTION ARISING OUTSIDE STATE.

Purpose of Proviso, etc. —

The second sentence of this section, the "borrowing statute" element, limits the effect of the first sentence by applying the foreign state's statute of limitation in those situations where the foreign statute would bar the action; in other words, the "borrowing statute" will prevent a plaintiff from retaining the right to sue indefinitely. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

Claim Arising Out-of-State Against Nonresident. — This section has been construed to mean that if the cause of action arises in another state against an out-of-state defendant, then the statute of limitation does not begin to run until the nonresident defendant comes into this State so that he or she is subject to the personal jurisdiction of this State's courts. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

CASE NOTES

I. In General.

I. IN GENERAL.

Application to Securities Action. — Since § 78A-56 is a statute of limitations and not a statute of repose, in action seeking recession of purchase of securities the two-year statute of limitations provided for in § 78A-56(f) was tolled by operation of this section, because plaintiffs brought their claim within the one year extension provided by this section. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 1-26. New promise must be in writing.

CASE NOTES

I. In General.
II. Acknowledgment or New Promise.
III. Effect of Partial Payment.

I. IN GENERAL.

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

II. ACKNOWLEDGMENT OR NEW PROMISE.

Statute Not Tolled Without a Writing. —

In accord with second paragraph in the main volume. See Norris v. Belcher, 86 N.C. App. 459, 358 S.E.2d 79 (1987).

Conditional Expressions of Willingness to Pay. — Where defendant sent to plaintiff supplier a letter which stated "we plan to pay" and "we expect to pay" the debt, these conditional expressions of defendant's willingness to pay the plaintiff were not sufficiently precise to amount to an unequivocal acknowledgement of the original amounts owed and were insufficient to repel the statute of limitations. American Multimedia, Inc. v. Freedom Distrib., Inc., 95 N.C. App. 750, 384 S.E.2d 32 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 84 (1990).

III. EFFECT OF PARTIAL PAYMENT.

But Debtor Must Intend Thereby, etc. —

In accord with second paragraph in the main volume. See Norris v. Belcher, 86 N.C. App. 459, 358 S.E.2d 79 (1987).

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.

CASE NOTES

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

§ 1-28. Undisclosed partner.

CASE NOTES

Quoted in Pamlico Properties IV v. Seg Anstalt Co., 89 N.C. App. 323, 365 S.E.2d 686 (1988).

§ 1-30. Applicable to actions by State.

Legal Periodicals. — For note, "Reviving a Double Standard in Statutes of Limitations and Repose: Rowan County Board of Education v. United States Gypsum Company," see 71 N.C.L. Rev. 879 (1993).

CASE NOTES

Effect of Section on Common Law. —

Nullum tempus occurrit regi is not totally abrogated in North Carolina; the ancient maxim, and its historic public policy of preserving the public rights, revenues and property, still has a limited place in the modern age. Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

Nullum tempus survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. The General Assembly has acquiesced in this interpretation of this section. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Determining Factors as to Whether Limitations Apply. — Nullum tempus does not apply in every case in which the State is a party. If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

When the State or one of its political arms acts in a governmental fashion, it does not act in the same manner as a private party. Thus, time limitations do not run against the State unless the statute at issue expressly includes the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Proprietary Activity. — Pecuniary activity or activity of a type historically performed by private individuals, is proprietary in nature, therefore, the limitations statute applies. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

State Action as Governmental Function. — Given that the State (1) has undertaken the responsibility to provide free public schools, (2) has delegated day-to-day administration and operation of those schools to counties and local school boards, including the power to bring suit to recover money or property "which may be due to or should be applied to the support and maintenance of the schools" and (3) has retained the duty of providing those local entities with considerable operating funds from state revenues, the county board of education was acting as an arm of the State in pursuing the governmental function of constructing and maintaining its schools. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

The county board of education was acting in a governmental capacity when it brought suit to recover lost tax money expended in the construction of public schools — an activity incidental to and part of the State's constitutional duty to provide public education — and to abate a potential health hazard to students, teachers, staff, administrators, parents, and others using school buildings. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Construction and maintenance of local public schools by a local school board is a governmental function. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Limitations Statute Held Inapplicable. —

County school board's action to recover lost tax dollars expended in removing asbestos from school property was a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State, and the action was not barred by the statute of limitations. Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

Statutes of Repose. — Despite the fact that statutes of repose differ in some respects from statutes of limitation, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Stated in State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993).

§ 1-31. Action upon a mutual, open and current account.

CASE NOTES

Section Inapplicable to Oral Agreement for Rent. — Even if the cause of action to enforce an oral agreement for rent was not barred by the statute of frauds, this section did not apply to it, because the agreement was not a mutual account. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

ARTICLE 4.

Limitations, Real Property.

§ 1-35. Title against State.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

§ 1-38. Seven years' possession under color of title.

Legal Periodicals. —

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

I. In General.
II. Possession, Generally.
III. Hostile or Adverse Nature of Possession.
IV. Continuity of Possession.
V. Boundaries of Land Possessed.
VI. Color of Title.
  A. In General.
  B. Documents Held to Be Color of Title.
  C. Documents Held Not Color of Title.
VII. Procedure and Proof.

I. IN GENERAL.

Limitations for Ejectment Actions. — This section and § 1-40 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment, controlled by this section and § 1-40;

rather, plaintiffs' action was one to remove a cloud upon title, which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

Town satisfied the requirements for a prescriptive easement in a road over defendant's land which had been used by the public and as a mail and school bus route since 1956 or at least since 1963 until 1985, and which had been maintained, however poorly, by the town. Town of Sparta v. Hamm, 97 N.C. App. 82, 387 S.E.2d 173 (1990), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Section Held Tolled by Federal Law. — This section, the seven-year statute of limitations for adverse possession under color of title, was automatically and unconditionally tolled by 50 U.S.C.A. App. § 525 of the Soldiers' and Sailors' Civil Relief Act until plaintiff's retirement from military service in June, 1983. Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987).

Applied in Foreman v. Sholl, 339 N.C. 593, 453 S.E.2d 162 (1995).

Stated in Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993).

Cited in Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989); Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

II. POSSESSION, GENERALLY.

Elements of Adverse Possession, Generally. —

In order to prevail on claim of adverse possession, evidence must show both actual and adverse possession for the full seven-year period prescribed in this section. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

Paying taxes is not enough, etc. —

The payment of property taxes is evidence of the adverse nature of a claim, but it is not evidence of actual possession. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

Acts of Possession Held Insufficient. —

Posts which were erected less than seven years before action was commenced could not be used to establish possession. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

In order to establish that a use is hostile, etc. —

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

There must be some evidence accompanying the use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Exercise of Dominion Required. — The adverse possession must constitute an exercise of dominion over the land, making the ordinary use and taking the ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

Institution of Torrens Proceeding as Ouster Permitting Defendants to Ripen Title. — Where defendants, who held deeds to land which were color of title, and plaintiffs, who had superior chain of title to same property, were tenants in common as to the property, and after certain incidents, plaintiff's predecessor in interest brought a Torrens proceeding to establish sole ownership of the property, institution of that action gave plaintiffs actual notice that defendants were claiming the property to the exclusion of plaintiffs and their predecessors, and an actual ouster had occurred. Once plaintiffs were ousted, defendants could ripen title in seven years under this section. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

IV. CONTINUITY OF POSSESSION.

Effect of Voluntary Dismissal of Torrens Proceeding. — Effect of plaintiffs' voluntary dismissal of Torrens proceeding was to toll the limitations period on defendants' adverse claim to the disputed property for the subsequent 12 months; when plaintiffs failed to bring a new action within that period, however, the limitations period continued to run from the point at which it had been tolled. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

V. BOUNDARIES OF LAND POSSESSED.

Editor's Note. — *The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overruled Price v. Whismant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they applied a different rule.*

Possession Extended, etc. —

Where one, or his predecessor in title, enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion of the land to the outer bounds of his deed. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Actual possession of one tract cannot be constructively extended to an adjoining tract. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), holding that when one, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own, his possession is adverse, would be applied to a case which was pending on appeal when the decision was announced. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

No Evidence of Bad Faith. — Where there was no evidence and no claim by plaintiffs that defendants exchanged their deeds in bad faith, defendants' deeds were color of title. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

VI. COLOR OF TITLE.

A. In General.

Adverse possession, to ripen into title after seven years, etc. —

In accord with original. See Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to this section. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years shall give title to the easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Color of Title Defined. —

Color of title is generally defined as a written instrument which purports to convey the land described in the written instrument, but fails to do so because of (1) want of title in the grantor, or (2) some defect in the mode of conveyance. If these defects do not exist, title is actually passed by the instrument and there can be no color of title. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Adverse possession under color of title is occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Color of Title Affords No Protection Where, etc. —

A deed which is color of title without adverse possession does not afford the grantee protection of the statute. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Actual Possession of Part of Land. — When a person claims ownership through color of title, as long as that person has some actual possession of a part of the land, he or she is deemed the constructive possessor of the remainder of the land described in the instrument constituting color of title. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

A deed offered as color of title, etc. —

In accord with the main volume. See Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988); Rudisill v. Icenhour, 92 N.C. App. 741, 375 S.E.2d 682 (1989).

This section is applicable to prescriptive easements. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

The doctrine of color of title is applicable to acquisition of title to an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

The period for acquiring an easement by prescription is now seven years where the claim is under color of title pursuant to this section. The burden is on defendants to show that they used the easement more or less frequently according to the nature of the easement and that they used the easement for seven years. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Where one can acquire fee simple title to the greater interest under color of title pursuant to this section, common sense dictates that, in the absence of statutes to the contrary, one should also be able to acquire title to easements appurtenant to that interest in the same statutory period. To hold otherwise would require the grantee to wait 20 years to gain title to an easement he had bargained for in the deed from his grantor, when he would be required to wait only seven years for the real property itself, if the grantor had not in fact had title to convey. This is not logically consistent and would produce harsh results. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

B. Documents Held to Be Color of Title.

Deed When Person Does Not Have Title. — A color-of-title situation can arise when the person executing the writing does not actually have title. A deed may constitute color of title for the land therein described. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

C. Documents Held Not Color of Title.

Description in Deed. — The trial court did not err in granting summary judgment for defendants where plaintiffs could not prove that the deed upon which they relied contained an adequate description of the property. Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), cert. improvidently granted and appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995).

VII. PROCEDURE AND PROOF.

Burden of Proof When Adverse Possession Is Claimed. —

The party claiming title by adverse possession has the burden of proof on that issue. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

§ 1-39. Seizin within twenty years necessary.

Legal Periodicals. — For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

§ 1-40. Twenty years adverse possession.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

I. In General.
II. Possession, Generally.
III. Hostile or Adverse Nature of Possession.

I. IN GENERAL.

Editor's Note. — *The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overruled Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972), which are annotated under this section in the main volume, to the extent that they applied a different rule.*

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to § 1-38. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years pursuant to § 1-38 shall give title to the easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Limitations for Ejectment Actions. — This section and § 1-38 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' actions was not in essence one for ejectment controlled by § 1-38 and this section; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

Applied in Walls v. Grohman, 74 N.C. App. 448, 324 S.E.2d 874 (1985).

Stated in Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993).

Cited in Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

II. POSSESSION, GENERALLY.

***Editor's Note.** — See the Editor's note above under analysis line I., In General.*

Requisites of Adverse Possession.—

Adverse possession is as the actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another for the statutory period. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

To acquire title to land through adverse possession, plaintiff must show actual, open, hostile, exclusive, and continuous possession of the land claimed for 20 years under known and visible lines and boundaries. Curd v. Winecoff, 88 N.C. App. 720, 364 S.E.2d 730 (1988).

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Establishment of Easement by Prescription. — An easement by prescription is created by adverse possession. To establish an easement by prescription, defendants must prove: (1) that their use of roadway was adverse, hostile or under claim of right; (2) that this use was open and notorious such that plaintiff had notice of the claim; (3) that this use has been continuous and uninterrupted for a period of at least 20 years; and (4) that there was substantial identity of the easement claimed throughout the 20-year period. Furthermore, defendants must rebut the presumption that their use of the road was made with the plaintiff's permission, since a permissive use of a roadway can never ripen into a prescriptive easement. Curd v. Winecoff, 88 N.C. App. 720, 364 S.E.2d 730 (1988).

Adverse possession, to ripen into title after seven years, must be under color of title. Otherwise, a period of 20 years is required. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

The "continuity" necessary for a party to establish a prescriptive easement depends on the nature of the easement asserted. The use simply has to be often enough for the true owner to have notice that a party is asserting an easement. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Evidence Held Sufficient. — Sufficient evidence was presented to show that defendant acquired title to property by adverse possession. Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

***Editor's Note.** — See the Editor's Note above under analysis line I., In General.*

In order to establish that a use is hostile, etc. —

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

For case applying the holding of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985) to a case which was pending on appeal when the decision was announced, see Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

There must be some evidence accompanying a use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent.

A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Remaindermen did not meet the requisite requirements for adverse possession where their possession of the property was not adverse in that it was with the acquiescence and permission of the life tenant; the parties stipulated that the property was partitioned "with the knowledge of" the life tenant; and there was no record evidence that the trust had been terminated. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Whether Acts Sufficient to Establish an Easement. — Evidence at trial that party claiming an easement maintained and repaired the roadway, that he went onto the property at least once each year to clear out the roadway and that as far as he knew, he was the only person who did so on a regular basis, was sufficient to create a jury question of whether his use of the roadway was adverse, hostile or under claim of right. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Absent Actual Ouster, etc. — Before a person can adversely possess land held in cotenancy, there must be an ouster of his cotenants. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Constructive Ouster. — North Carolina adheres to the rule of constructive ouster. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

The rule of constructive ouster presumes the requisite ouster and is as follows: where one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for 20 years and where there has been no demand for rents, profits or possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Upon completion of the statutory period, the constructive ouster relates back to the initial taking of possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.

Legal Periodicals. —

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

§ 1-42.9. Ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, and that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of five years prior to January 1, 1986, any person, having the legal capacity to own land in this State, who has on January 1, 1986, an unbroken chain of title of record to the surface estate of the area of land for at least 30 years and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the fee estate as provided in the succeeding subsections of this section, subject to the interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record is formed.

(b) This marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all fee simple oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to January 1, 1986, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity. Provided, however, that any fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after January 1, 1986, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make the property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. The notice may be made and recorded by the claimant, by any person authorized by the claimant to act on his behalf, or by any person acting on behalf of any claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral leases.

(d) Within two years from January 1, 1986, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership and forfeitable under the terms of G.S. 1-42.9(b) must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.9(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina.

(e) The board of county commissioners shall publish a notice of this section in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986.

(f) This section applies to a county that failed to publish a notice as required by subsection (e) but that published a notice of this section in a newspaper having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986. In applying this section to that county, however, the date "1984" shall be substituted for the date "1983" each time it appears in this section. (1983, c. 502; 1983 (Reg. Sess., 1984), c. 1096, ss. 1-3; 1985, c. 160; c. 573, s. 1.)

Cross References. — As to railway corridor preservation, see § 136-44.36A.

Editor's Note. —

Session Laws 1985, c. 573, s. 2, which substituted "January 1, 1986" for references to January 1, 1983, September 1, 1983, and September 1, 1984, in this section, provides:

"This act does not revive any interests rendered ineffective under the provisions of G.S. 1-42.1 through G.S. 1-42.8 and G.S. 1-42.9. Nor does this act extend the time established in Chapter 502 of the 1983 Session Laws for preserving and keeping effective any fee simple interest in oil, gas, or minerals founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to September 1, 1983, if the board of county commissioners where the land lies published the notice required by Chapter 502 of the 1983 Session Laws.

"This act shall not affect those who have heretofore complied with the provisions of Chapter 502 of the 1983 Session Laws, and no further notice need be filed and recorded in the office of the Register of Deeds."

§ 1-44. No title by possession of right-of-way.

CASE NOTES

Plain words of this section do not require that a railroad actually use land; the railroad need only have "obtained for its use" the land for a railroad purpose. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

Allegation that railroad forfeited the protection of this section by not using or planning to use land for purposes set forth in the statute was without merit. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

§ 1-44.1. Presumption of abandonment of railroad right-of-way.

CASE NOTES

This section refers to abandonment of easements; it has no application to land owned in fee simple. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

§ 1-44.2. Presumptive ownership of abandoned railroad easements.

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

The side boundaries of each parcel so presumptively vested in the adjacent property owner shall be determined by extending the side property lines of the adjacent parcels to the centerline of the abandoned easement, or as the case may be, the nearest edge of the public road right-of-way. In the event the side property lines of two adjacent property owners intersect before they meet the centerline or nearest edge of the public road right-of-way, as the case may be, such side property lines shall join and run together from the point of intersection to the centerline of the easement or nearest edge of the public road right-of-way, as the case may be, perpendicular to said centerline or edge.

(b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 6, effective July 7, 1988. (1987, c. 433, s. 1; 1987 (Reg. Sess., 1988), c. 1071, s. 6.)

Cross References. — As to railway corridor preservation, see § 136-44.36A.

Editor's Note. — Session Laws 1987, c. 433, s. 2 made this section effective upon ratification, but provided that it would not apply to pending litigation. The act was ratified June 19, 1987.

Effect of Amendments. — Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 6, which deleted subsection (c) was effective July 7, 1988, and was applicable only to railroad corridors and abandonments after July 7, 1988.

CASE NOTES

Constitutionality. — This section is unconstitutional as it applies to fee simple landowners in possession of disputed property, in that it fails to provide them with adequate notice, an opportunity to be heard, and with just compensation. McDonald's Corp. v. Dwyer, 111 N.C. App. 127, 432 S.E.2d 165, aff'd, 338 N.C. 445, 450 S.E.2d 888 (1994).

The first sentence of subsection (b) of this section is unconstitutional because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owner of a valuable property interest. The remaining portions of this section were not challenged and remain in full force and effect. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

Conclusive Presumption. — The first sentence of subsection (b) of this section that provides that persons claiming contrary to the presumption of subsection (a) must bring a lawsuit within one year of the enactment of the statute or the abandonment of the easement, whichever later occurs, or lose their right to rebut the presumption, turns a rebuttable presumption into a conclusive presumption which effectively takes a defendants' property without affording notice, an opportunity to be heard and just compensation. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

Public Road Right-of-Way Easement. — A public road right-of-way that was wholly within an abandoned railroad easement did not adjoin the easement and the second sentence of subsection (a) of this section did not apply. To adjoin, a tract must be "close to or in contact," "next to" or "touching." None of the definitions include a tract that is encompassed within another tract. Nelson v. Battle Forest Friends Meeting, 335 N.C. 133, 436 S.E.2d 122 (1993).

§ 1-45. No title by possession of public ways.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes:

The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 1-45.1. No adverse possession of property subject to public trust rights.

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this section, "public trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches. (1985, c. 277, s. 1.)

Editor's Note. — Session Laws 1985, c. 277, s. 2 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified May 30, 1985.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Public Trust Rights. — The legislature recognized public trust rights in its legislative finding that the undeveloped natural areas on the North Carolina coast are vital to public trust rights such as hunting, fishing, navigation and recreation. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

CASE NOTES

Statutes of limitations are affirmative defenses available only to persons against whom an action is brought; they are not available to volunteers who intervene to assert some claimed right of their own. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990).

Waiver of Right to Plead Statute of Limitations. — Defendant intervenor waived his right to plead the statute of limitations as a matter of law by failing to assert that defense in a former action in which he paid assessments he subsequently claimed were barred. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990).

Applied in Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

Cited in Matthews v. Johnson Publishing Co., 89 N.C. App. 522, 366 S.E.2d 525 (1988).

§ 1-47. Ten years.

Cross References. — As to limitations period for unknown and certain other claims against a dissolved corporation, see § 55-14-07.

Legal Periodicals. —

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

I. In General.
II. Judgments and Decrees.
IV. Sealed Instruments.
  A. In General.
  B. Counterclaims.
V. Mortgage Foreclosure.

I. IN GENERAL.

Where a plaintiff brought an action to prevent the 10-year statute of limitations from barring his recovery on a prior judgment, the action was in the nature of an independent action on the judgment, the only procedure in this state by which a judgment can be renewed. As it was a separate and distinct action, the plaintiff could request, in his complaint, interest at the legal rate of 8%, and the trial court could award interest at that rate from the date the present action was instituted until the judgment is satisfied. Speros Constr. Co. v. Musselwhite, 103 N.C. App. 510, 405 S.E.2d 785 (1991).

Applied in Square D. Co. v. C.J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984); Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987); Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Stated in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 412, 303 S.E.2d 561 (1983); Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Cited in Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 107 N.C. App. 110, 418 S.E.2d 529 (1992); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992); Fitch v. Fitch, 115 N.C. App. 722, 446 S.E.2d 138 (1994).

II. JUDGMENTS AND DECREES.

A child support order is a judgment directing payment of a sum of money and falls within the 10-year statute of limitations of this section. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986); State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Running of Statute — On Alimony and Child Support, etc. —

The statute of limitations begins to run against each support payment as it becomes overdue, not from the date the decree ordering support was entered; accordingly, there is no bar to recovery of unpaid child support payments which came due during the ten years immediately prior to the filing of a claim for past due support. State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Subsequent Adoption of Children Without Affect on Statute of Limitations for Support Payments. — In the absence of evidence that mother waived her right to past due payments, nothing about childrens' subsequent adoption affected father's pre-adoption obligation to provide support for his children, and nothing about the subsequent adoption affected the applicable statute of limitations. State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Arrearages Reduced to Judgment. — Once the amount of arrearages is reduced to judgment, however, as occurred when the out of state court entered its order, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

IV. SEALED INSTRUMENTS.

A. In General.

And Does Not Apply to Actions Against Sureties. —

The statute of limitations barring actions against defendants as sureties is

§ 1-52, and not subdivision (2) of this section, notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Suit by Surety on Note Under Seal. — Section 26-3.1 allows a surety to sue a principal on the original instrument or for reimbursement on the surety agreement. After three years, a suit on the latter theory would be barred by § 1-52. Where a surety elects to sue on the underlying note under seal, he has the same rights the bank had on the original note. Thus, this section, the 10-year statute of limitations, applies. Adams v. Bass, 88 N.C. App. 599, 364 S.E.2d 194 (1988).

Determination of whether an instrument is a sealed instrument, commonly referred to as a specialty, is question for the court. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Presence of the word "seal" was sufficient to qualify contract for the sale of land as a sealed instrument for which the ten-year statute of limitations would apply. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

Evidence of the word "seal" in brackets is sufficient to overcome the three-year statute of limitations; thereby qualifying the contract as a sealed instrument. Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 384 (1985).

Ordinarily, proof that the obligation creating the indebtedness is a written instrument under seal repeals the three-year statute of limitations, and the rights of the parties would then be governed by the 10-year period of limitations under this section. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1984).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1984).

Corporate Seal. — The fact that a corporate seal was impressed on a contract, without more, is not sufficient to convert the contract into a sealed instrument, i.e., specialty. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

The question to be answered in order to determine whether a corporate seal transforms a party's contract into a sealed instrument, i.e., a specialty, is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Absent any evidence that would tend to indicate that the parties intended that construction contract to which corporate seal of contractor had been affixed was to be a sealed instrument, the contract was not a specialty and the 10-year period of limitation contained within subdivision (2) would be inapplicable to plaintiff's action for breach of same. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

B. Counterclaims.

Failure to denominate a claim as a counterclaim does not preclude its treatment as such. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

V. MORTGAGE FORECLOSURE.

Prerequisites to Bar. —

In order for a foreclosure to be barred under this section, two events must occur: (1) The lapse of 10 years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) the possession of the mortgagor during the entire 10-year period. These two requirements must be coexistent. In addition, possession for the 10-year period must be actual possession. In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

Extent of Protection Offered by Subdivision (3). — The protection offered by subdivision (3) of this section is not limited to the original mortgagor or grantor, but also extends to subsequent purchasers. In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d

409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

Running of Statute. — Where note holder did not accelerate the maturity of the note even though he could have, the statute of limitations did not begin to run until the day the last payment on the note was due. In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

§ 1-50. Six years.

(a) Within six years an action —

(1) Upon the official bond of a public officer.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
2. Actions to recover damages for the negligent construction or repair of an improvement to real property;
3. Actions to recover damages for personal injury, death or damage to property;
4. Actions to recover damages for economic or monetary loss;
5. Actions in contract or in tort or otherwise;
6. Actions for contribution indemnification for damages sustained on account of an action described in this subdivision;
7. Actions against a surety or guarantor of a defendant described in this subdivision;
8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

c. For purposes of this subdivision, "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

d. The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

e. The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

f. This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

(6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

(7) a. No action against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting shall be brought more than 10 years from the last act or omission giving rise to the cause of action.

b. For purposes of this subdivision, "surveying and platting" means boundary surveys, topographical surveys, surveys of property lines, and any other measurement or surveying of real property and the consequent graphic representation thereof.

c. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c) and G.S. 1-52(16).

(b) This section applies to actions brought by a private party and to actions brought by the State or a political subdivision of the State. (C.C.P., s. 33; Code, s. 154; Rev., s. 393; C.S., s. 439; 1931, c. 169; 1963, c. 1030; 1979, c. 654, s. 2; 1981, c. 644, s. 1; 1991, c. 268, s. 2; 1995, c. 291, s. 1.)

Cross References. — As to limitations period for unknown and certain other claims against a dissolved corporation, see § 55-14-07.

Editor's Note. —

Session Laws 1991, c. 268, s. 2, which added subdivision (7), was effective June 12, 1991, and was applicable to any action filed on or after that date.

Session Laws 1995, c. 291, s. 2, provides for the repeal of the common law doctrine of nullum tempus occurit regi for civil actions subject to this section brought by the State or political subdivisions of the State, and to actions brought by private parties.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to civil actions commenced on or after that date, added the subsection (a) designation, and added subsection (b).

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of subdivision (6) of this section, see 19 Wake Forest L. Rev. 1049 (1983).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note on six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For survey, "Contract Warranties and Remedies: A Comprehensive Survey of the Creation, Modification and Exclusion of Contract Warranties and Remedies for Attorneys and Contracting Professionals," see 14 Campbell L. Rev. 323 (1993).

CASE NOTES

I. In General.
V. Defective Condition of Improvements to Real Property.
VI. Defective Products.

I. IN GENERAL.

This section and § 1-15(c) are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985); Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Subdivision (6) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of N.C. Const., Art. I, § 32. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

This section does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses of the state or federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Applied in Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985); Forsyth Mem. Hosp. v.

Armstrong World Indus., Inc., 107 N.C. App. 110, 418 S.E.2d 529 (1992); Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Cited in Tetterton v. Long Mfg. Co., 67 N.C. App. 628, 313 S.E.2d 250 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984); Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Terry v. Pullman Trailmobile, 92 N.C. App. 687, 376 S.E.2d 47 (1989); Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 107 N.C. App. 110, 418 S.E.2d 529 (1992); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); Cage v. Colonial Bldg. Co, 111 N.C. App. 828, 433 S.E.2d 827 (1993).

V. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Subdivision (5) is Substantive. — Paragraph a of subdivision (5) of this section is substantive in nature and imposes, as a condition precedent to a cause of action, that plaintiff establish that the action is brought within six years of the completion of the improvement or last negligent act of the defendant, whichever occurs later, even though the injury or damage may not have occurred before the expiration of the time limitation. Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

Outside Limit of Six Years. — Subdivision (5) provides an outside limit of six years after the performance of construction services. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

A special provision for latent defects in subdivision (5) states explicitly that its limited discovery rule falls within the outside restriction of the six-year period. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Subdivision (5) was intended to apply to all actions against architects, and others therein described, where the plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Subdivision (5) of this section is a statute specifically applicable to architects and others who plan, design or supervise construction, or who construct improvements to real property; therefore it and not § 1-15(c) should govern a claim for breach of contract, breach of warranties, and negligence in failing to properly design and construct buildings. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Remote Manufacturers. — If defendant were only a remote manufacturer whose materials found their way to plaintiffs' jobsite indirectly through the commerce stream, then defendant would not be a materialman and would not have furnished materials on the jobsite within the meaning of subsection (5)(b)(9), and the products liability, statute in subsection (6) would apply, rather than the real property improvement statute of repose. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Subdivision (5) of this section is not a discovery statute but runs from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (5) of this section is a statute of repose and not a statute of limitation. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

Subdivision (5) of this section is a statute of repose which bars actions for personal injuries or property damages allegedly caused by defects in design, construction or repairs to real property unless the action is brought within six years from the completion of the work. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Continuing Duty to Inspect and Maintain Premises. — Subsection (d) plainly excludes from subsection (a) any person who is in possession or control of property at the time that person's negligent conduct proximately causes injury or damage to the claimant; the purpose of the exclusion is to place a continuing duty "to inspect and maintain premises" on persons who, after having constructed the property, remain in possession and control. Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994).

The exception in paragraph (5)d, for owners and tenants is based on a continued duty to inspect and maintain the premises. Gillespie v. Coffey, 86 N.C. App. 97, 356 S.E.2d 376 (1987).

The exception found in subdivision (5)d is based on the continued duty of owners and tenants to inspect and maintain the premises. The exception indicates that the limited period of liability was not intended to apply to those in actual possession or control of the land if they knew or had reason to know of the defect. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Construction with Other Sections. — The terms of § 1-52(16) apply "unless otherwise provided by statute"; therefore, since subsection (5) is the statute of repose governing actions against a materialman arising out of improvement to real property, it applies to the exclusion of § 1-52(16). Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Subsequent purchaser of house can maintain action against original builder for negligent construction of the house, and such an action is governed by the time limitations set forth in subdivision (5) of this section. Evans v. Mitchell, 77 N.C. App. 598, 335 S.E.2d 758 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

Claim Against Third Party for Indemnification or Contribution. — The accrual date of original plaintiff's claim determines which version of the statute of repose is applicable to the defendant's claim for indemnification or contribution against a third party. New Bern Assocs. v. Celotex Corp., 87 N.C. App. 65, 359 S.E.2d 481, cert. denied, 321 N.C. 297, 362 S.E.2d 782 (1987).

Chairlift as Improvement to Real Property. — As between owner and company which redesigned and repaired chairlift for recreational park, the chairlift would be treated as an "improvement to real property" and owner's third-party action against the company for negligence would be barred by this section. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Installation of gasoline storage tanks was not an improvement to real property within the meaning of subdivision (5), where the intention of the contracting parties at the time of installation was that the tanks would remain personal property. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Statute of Repose No Defense. — Under subsection (5), no statute of repose may be asserted as a defense to a claim of willful and wanton misconduct. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Action Barred. — Action instituted on November 6, 1984, arising out of a fire which occurred on March 28, 1983, at the plaintiff's plant, allegedly caused by the explosion of a Sylvania 100-watt Metalarc lamp manufactured by one defendant, distributed by another, and installed as part of the plaintiff's plant by third defendant, electrical subcontractor for fourth defendant, the general contractor, was barred by this section where construction of the plant was completed on or before April 30, 1978. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

Plaintiff was barred by subdivision (5) from bringing action against city seeking damages for injuries suffered due to a fall at a restaurant, based on plaintiff's claim that remodeling of the restaurant entryway in May, 1979, did not meet the requirements of the North Carolina State Building Code, where the last act of defendant city occurred in May, 1979, when the building inspector approved the remodeling and concluded that the alterations to the restaurant complied with the Building Code. Gillespie v. Coffey, 86 N.C. App. 97, 356 S.E.2d 376 (1987).

Where plaintiffs, in their complaint, never alleged wanton negligence or made any assertions of intentional wrongdoing, and plaintiffs' claim was filed more than six years after defendants completed improvements to the real property in question, subdivision (5) of this section barred the action. Duncan v. Ammons Constr. Co., 87 N.C. App. 597, 361 S.E.2d 906 (1987).

Because defendant's conduct occurred more than six years before plaintiff brought her claim, the six-year statute of repose in subsection (a) barred the claim. Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994).

Claim Not Barred. — Claim which arose after the 1981 amendment to subdivision (5) of this section, which eliminated claims involving willful or wanton negligence from the operation of subdivision (5), held not barred, even though more than six years had elapsed since the building in question had been constructed. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

Estoppel from Raising Subdivision (5). — In case in which plaintiff and defendant had entered into extension agreements in which defendants agreed not to raise a defense based on any statute of limitations to a claim filed by any of the plaintiffs, defendants were estopped from raising subdivision (5) of this section in bar of plaintiffs' action on two grounds: (1) having made representations upon which plaintiffs relied, defendants could not in good faith repudiate such representations to plaintiffs' detriment, and (2) having reaped the benefits from the extension agreements, defendants could not challenge the terms thereof. One N. McDowell Ass'n v. McDowell Dev. Co., 98 N.C. App. 125, 389 S.E.2d 834, cert. denied, 327 N.C. 432, 395 S.E.2d 686, 687 (1990).

VI. DEFECTIVE PRODUCTS.

Constitutionality of Subdivision (6). — Although the North Carolina Supreme Court has yet to address the validity of subdivision (6), it has addressed the validity of paragraph (5)a, a companion provision dealing with defective or unsafe conditions resulting from an improvement to real property, and has found that statute valid (see Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), modified and aff'd, 308 N.C. 419, 302 S.E.2d 868 (1983)). In addition, Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982), by way of dicta, strongly indicated a similar result for subdivision (6). Brown v. GE Co., 584 F. Supp. 1305 (E.D.N.C. 1983), aff'd, 733 F.2d 1085 (4th Cir. 1984).

Subdivision (6) of this section is constitutional. Brown v. GE Co., 733 F.2d 1085 (4th Cir.), cert. denied, 469 U.S. 858, 105 S. Ct. 189, 83 L. Ed. 2d 122 (1984); Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Legislative Intent. — Lam v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), contains the correct interpretation of the legislature's intent in enacting the 1963 version of subdivision (5) of this section. Starkey v. Cimarron Apts., Inc., 70 N.C. App. 772, 321 S.E.2d 229 (1984), cert. denied, 312 N.C. 798, 325 S.E.2d 633 (1985).

The built-in "accrual" date language in subdivision (6) "initial purchase for use or consumption" is not unconstitutionally vague; the obvious intent of the legislature was to limit manufacturers' liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) of this section is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Public Policy. — As subdivision (6) of this section and § 1-52(16) make clear, the public policy of this State is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of an allegedly defective product and long after a defendant participated in its manufacture or design. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

The North Carolina General Assembly intended to establish a fixed cut-off date to bar actions brought after six years involving an injury caused by a manufactured good. A defendant escapes liability if the action is not brought within the six-year window provided by subdivision (6) of this section. Lindsay v. Public Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

With No Exception for Failure to Warn. — The statute of repose in subdivision (6) of this section, as incorporated into the North Carolina products liability statute, Chapter 99B, anticipates that the statute includes any action brought for or on account of personal injury. Specifically, the statute includes those injuries caused by or resulting from a warning (or lack thereof). Thus, the statute of repose contains no exception for failure to warn. Lindsay v. Public

Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

Construction with Other Sections. — The clear and explicit intent of the legislature, as evidenced by the statutory language of the Products Liability Act itself, is to allow the statute of repose to be tolled if § 1-17 applies. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Purpose of Subdivision (6). —

Subdivision (6) excludes all actions brought after six years, whether these actions are first-party actions, cross-claims or counter-claims. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) as Statute of Repose. —

Subdivision (6) of this section is not a statute of limitation but is instead merely a "statute of repose" that places an outer limit on the time period within which a products liability action may be brought. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Statutes such as subdivision (6) of this statute have been denominated statutes of repose because they set a fixed limit after the time of the product's manufacture, sale, or delivery beyond which a plaintiff's claim will not be recognized. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Statutes of Repose and Statutes of Limitation Compared. — The term "statute of repose" is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action. This distinction corresponds to the distinction between procedural and substantive laws. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Characterization of a statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights, holds true in the context of choice of law. When commencement of an action within a specified period is a condition precedent to relief, "the limitation period is considered to be so tied up with the underlying right that for choice of law purposes, the limitation clause is treated as a 'substantive' rule of law." Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Statute of Repose Cannot Be Impaired by Later Retroactive Statute. — Once the 1963 version of this section barred the plaintiffs' suit, a subsequent statute could not revive it. A statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action. Filing within the time limit prescribed is a condition precedent to bringing the action. Failure to file within that period gives the defendant a vested right not to be sued. Such a vested right cannot be impaired by the retroactive effect of a later statute. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

In enacting subdivision (5) of this section, the Legislature defined a liability of limited duration. Once the time limit on the plaintiffs' cause of action expired, the defendants were effectively "cleared" of any wrongdoing or obligation. If a court were to find that a later version of subdivision (5) of this section operates retrospectively, then it must revive a liability already extinguished, and not merely restore a lapsed remedy. Such a revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

Initial Purchase for Use. — Manufacturer's purchase of component parts for the purpose of assembly into drying ranges, like a dealer-distributor's purchase of a product for the purpose of resale, was not the "initial purchase for use" within the meaning of subdivision (6) of this section; plaintiff's purchase of the drying ranges for the purpose of manufacturing textiles was the "initial purchase for use" because manufacturing textiles was the ultimate or intended use of this product. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 391 S.E.2d 211, cert. denied, 327 N.C. 632, 395 S.E.2d 675 (1990).

Choice of Law. — Statutes of repose are treated as substantive provisions for choice of law purposes. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Multiplicity of Claims Covered. — The generality of the language in subdivision (6) of this section indicates that the Legislature intended to cover the multiplicity of claims that can arise out of a defective product. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

Fraud Claim Arising from Express Representation That Plaintiff's Interests Would Be Defended Held Not Barred. — The court erroneously dismissed plaintiffs' fraud claim arising from defendant's allegedly express representation that it would defend plaintiffs' interests; the bar evidenced by subdivision (6) was inapplicable to this particular fraud claim since plaintiffs alleged that they were injured by defendant's intentionally deceptive express representation that defendant would provide counsel for them and since this representation was allegedly made irrespective of barred products liability claims. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, cert. denied, 323 N.C. 363, 373 S.E.2d 541 (1988).

Claims Arising out of Disease. — This section, insofar as it constitutes a statute of repose, has no application to claims arising out of a disease. Silver v. Johns-Manville Corp., 789 F.2d 1078 (4th Cir. 1986).

This section did not bar plaintiff's claim for damages for asbestosis, even though the product alleged to have given rise to the injury was purchased more than six years prior to the alleged onset of the disease. Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986).

Disease is not included within a statute of repose directed at personal injury claims unless the legislature expressly expands the statute's language to include it. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

Where injury or death is alleged to have resulted from disease, the six-year statute of repose under this section is inapplicable. Guy v. E.I. DuPont de Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

Asbestos-Related Claims. — Subdivision (6) does not bar action for wrongful death resulting from exposure to asbestos products brought pursuant to diversity jurisdiction. Burnette v. Nicolet, Inc., 818 F.2d 1098 (4th Cir. 1986).

Failure to Allege Viable Claim Under Chapter 99B. — Where plaintiffs sought recovery for damages to a mobile home, a product manufactured by defendant, plaintiffs' complaint did not allege a viable claim under Chapter 99B, and subdivision (6), the statute of limitations for product liability actions brought under Chapter 99B, was inapplicable. Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993).

Action Held Precluded. — Where date of initial purchase of Volkswagen bus whose lack of crashworthiness plaintiff alleged caused him serious personal injuries in an accident on March 24, 1983, was on or about September 4, 1974, by its clear language, the North Carolina statute of repose, subdivision (6) of this section, precluded plaintiff's action. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

§ 1-51. Five years.

Cross References. — As to limitation period for unknown and certain other claims against a dissolved corporation, see § 55-14-07.

Editor's Note. — Section 55-14-07 provides, inter alia, that unknown and certain other claims against a dissolved corporation must be commenced within five years after the publication date of the corporation's newspaper notice of dissolution.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-52. Three years.

Within three years an action —

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

(2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.

(3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

(4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

(7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

(8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(10) Repealed by Session Laws 1977, c. 886, s. 1.

(11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.

(12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-44-15(c).

(13) Against a public officer, for a trespass, under color of his office.

(14) An action under Chapter 75B of the General Statutes, the action in regard to a continuing violation accrues at the time of the latest violation.

(15) For the recovery of taxes paid as provided in G.S. 105-267 and G.S. 105-381.

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

(17) Against a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed or by October 1, 1984, whichever is later.

(18) Against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-50(7). (C.C.P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C.S., s. 441; 1945, c. 785; 1971, c. 939, s. 1; 1975, c. 252, ss. 2, 4; 1977, c. 886, s. 1; c. 916, s. 2; c. 946, s. 4; 1979, c. 654, s. 3; 1981, c. 702; c. 777, s. 4; 1991, c. 268, s. 1.)

Cross References. — As to statute of limitations in contracts for sale, see § 25-2-725.

Editor's Note. —

Session Laws 1991, c. 268, s. 1, which added subdivision (18), was effective June 12, 1991, and was applicable to any action filed on or after that date.

Legal Periodicals. —

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of subdivision (6) of this section, see 19 Wake Forest L. Rev. 1049 (1983).

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note, "Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations," see 64 N.C.L. Rev. 1438 (1986).

For article, "The Statute of of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note discussing the implications of implied warranty protection for used housing, in light of Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985), see 21 Wake Forest L. Rev. 515 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?" see 15 Campbell L. Rev. 223 (1993).

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I. IN GENERAL.

The Legislature has been careful to provide a statute that is as broad as possible in order to insure that plaintiffs with both latent and patent personal injury claims would receive an adequate opportunity to pursue them. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Statutes of Repose Constitutional. — Although a certain number of plaintiffs will always have a problem with a statute of limitation or repose, this does not mean that they have been denied a constitutional right. Statutes limiting the time within which an action may be brought are the result of a legitimate legislative determination which balances the rights and duties of competing groups. Such statutes serve a necessary function in the fair administration of justice. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The North Carolina statute of repose as applied to an occupational disease claim, does not violate the equal protection clause of U.S. Const., Amend. XIV and the open-courts and equal protection guarantees of N.C. Const., Art. I, §§ 18 and 32. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Plaintiff's argument that he had been denied equal protection because there is no legitimate public purpose to subdivision (16) of this section and because the statute promotes the interest of special groups over injured parties and the public in general was found to be without merit. Repose in the law is a legitimate public concern, and the repose granted after 10 years by subdivision (16) of this section is balanced against the plaintiff's expanded rights under the statute. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The purpose behind § 1A-1, Rule 4 and § 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19 (1985), overruled on other grounds, 317 N.C. 613, 346 S.E.2d 424 (1986).

Discovery of the Wrong. — Neither subdivision (2) nor subdivision (4) expressly provides for the three years to begin upon discovery of the wrong. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Cases to Which Section Applies. — Where bodily injury to the person or a defect in property is an essential element of the cause of action the three-year statute of limitations found in this section should be utilized. Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

When Equitable Estoppel Applies. —

The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant, by deception or a violation of duty toward the plaintiff, caused the plaintiff to allow his claim to be barred by the statute of limitations. Blizzard Bldg. Supply, Inc. v. Smith, 77 N.C. App. 594, 335 S.E.2d 762 (1985), cert. denied, 315 N.C. 389, 339 S.E.2d 410 (1986).

Statute Begins to Run when, etc. —

The limitations period does not begin to run, of course, until the injured party is at liberty to sue. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983), aff'd, 92 N.C. App. 571, 375 S.E.2d 520, cert. denied, 324 N.C. 333, 378 S.E.2d 789 (1989); Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

Accrual of Claim in Action to Recover for Water Contamination. — Where plaintiffs were assured until May, 1984 by state and local officials that no contamination was present in their wells and where plaintiffs were informed in

June, 1984, that their wells were contaminated, their cause of action accrued at this time, and because they instituted this civil action in July 1986, within three years from the time their cause of action accrued, their claims were not time-barred. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, rev'd on other grounds, Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition allowed as to additional issues, 325 N.C. 714, 388 S.E.2d 473 (1989), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Where plaintiffs sued to recover damages suffered as a result of gasoline contaminating their water and the earliest reports by the Department of Natural Resources and Community Development (now the Department of Environment, Health and Natural Resources) which indicated that their water contained nonorganic substances was compiled in 1985, plaintiff's intervention in the case in Dec. 1987 was well before the three-year limitations period had expired. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, rev'd on other grounds, Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition allowed as to additional issues, 325 N.G. 714, 388 S.E.2d 473 (1989), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Common law claims of trespass and nuisance, based on allegations of seepage of gasoline from defendant's underground tanks into plaintiff's water supply, were not barred by the statute of limitations for a continuing trespass found in this section, where the ongoing seepage created a renewing rather than a continuing trespass. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order, filed her complaint within the time allowed by the order, and properly served defendant with the complaint and a "Delayed Service of Complaint." The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Ordinarily, the bar of the statute, etc. —

Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Where the statute of limitations is properly pleaded and the facts are not in conflict, the issue becomes one of law. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Failure to plead subdivision (16) by precise number and subsection is not fatal under N.C.G.S. § 1A-1, Rule 8(c). Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Actions Against Police Officers for False Arrest, False Imprisonment, and Assault and Battery. — This section, providing for three-year statute of limitations, not § 1-54(3), providing for one-year statute, governed plaintiff's claims for false arrest and assault against police officer and city. Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

To the extent that Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958), Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), and Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981), hold that the one-year statute of limitation for false imprisonment and assault and battery is the applicable statute when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties, those cases are expressly overruled. Fowler v. Valencourt, 435 S.E.2d 530 (N.C. 1993).

Ruling that the three-year statute of limitation found in this section applies when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties was not to be given prospective application only.

Fowler v. Valencourt, 435 S.E.2d 530 (N.C. 1993).

Amendment Not Barred. — In depositor's action against bank to recover damages allegedly resulting from bank losing deposit in the original pleading, it was alleged that defendant breached the bailor-bailee relationship by failing to find and credit a deposit. Depositor's amendment to the complaint alleged that defendant's failure to find and credit the deposit was negligence. The amended pleading did not allude to any new occurrence or transaction; it merely characterized differently the same occurrences and transactions that the original pleading was based upon. The original pleading was notice to defendant of what was to be proved in the amended pleading pursuant to § 1A-1, Rule 15(c); therefore, the amendment was deemed to have been interposed at the time the claim in the original pleading was interposed. Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was § 1-15(c), rather than this section. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Applied in Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 724, 303 S.E.2d 561 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Seawell v. Miller Brewing Co., 576 F. Supp. 424 (M.D.N.C. 1983); Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., 310 N.C. 445, 312 S.E.2d 421 (1984); Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984); Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984); North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984); Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354 (1985); Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); Norris v. Belcher, 86 N.C. App. 459, 358 S.E.2d 79 (1987); New Bern Assocs. v. Celotex Corp., 87 N.C. App. 65, 359 S.E.2d 481 (1987); Jones v. Hodge, 662 F. Supp. 254 (E.D.N.C. 1987); Gentile v. Town of Kure Beach, 91 N.C. App. 236, 371 S.E.2d 302 (1988); Johnson v. City of Raleigh, 95 N.C. App. 479, 389 S.E.2d 849 (1990); Webster v. Powell, 98 N.C. App. 432, 391 S.E.2d 204 (1990); Thomas v. Thomas, 102 N.C. App. 124, 401 S.E.2d 396 (1991); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994); Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994); Lavender v. State Farm Mut. Auto. Ins. Co., 117 N.C. App. 135, 450 S.E.2d 34 (1994); Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Quoted in Pearce v. North Carolina State Hwy. Patrol Voluntary Pledge Comm., 64 N.C. App. 120, 306 S.E.2d 796 (1983); Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993), cert. denied, 339 N.C. 736, 454 S.E.2d 646 (1995); Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50, cert. granted, 337 N.C. 801, 449 S.E.2d 571 (1994).

Stated in Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984); Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Samuels v. American Transit Corp., 588 F. Supp. 105 (M.D.N.C. 1984); Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Coe v. Thermasol, Ltd., 785 F.2d 511 (4th Cir. 1986); Clay v. Employment Sec. Comm'n, 111 N.C. App. 599, 432 S.E.2d 873 (1993).

Cited in Coker v. Basic Media, Ltd., 63 N.C. App. 69, 303 S.E.2d 620 (1983); Hoch v. Young, 63 N.C. App. 480, 305 S.E.2d 201 (1983); Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984); Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985); Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985); Stanford v. Owens, 76 N.C. App. 284, 332 S.E.2d 730 (1985); Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985); Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986); Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855 (1986); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608 (1986); Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986); Cellu

Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986); Chmil v. Rulisa Operating Co. (In re Tudor Assocs.), 64 Bankr. 656 (E.D.N.C. 1986); Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987); In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987); Jetstream Aero Servs., Inc. v. New Hanover County, 672 F. Supp. 879 (E.D.N.C. 1987); McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988); South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988); Spaulding v. R.J. Reynolds Tobacco Co., 93 N.C. App. 770, 379 S.E.2d 49 (1989); Wilson Heights Church of God v. Autry, 98 N.C. App. 147, 379 S.E.2d 691 (1989); Travis v. Knob Creek, Inc., 94 N.C. App. 111, 380 S.E.2d 380 (1989); American Multimedia, Inc. v. Freedom Distrib., Inc., 95 N.C. App. 750, 384 S.E.2d 32 (1989); Shook ex rel. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989); Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989); Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989); Cherokee Ins. Co. ex rel. Weed v. R/I, Inc., 97 N.C. App. 295, 388 S.E.2d 239 (1990); Cheek v. Poole, 98 N.C. App. 158, 390 S.E.2d 455 (1990); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990); IR Constr. Prods. Co. v. D.R. Allen & Son, 737 F. Supp. 895 (W.D.N.C. 1990); Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 107 N.C. App. 110, 418 S.E.2d 529 (1992); Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992); Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994); Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995); Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

II. CONTRACTS.

A. In General.

Editor's Note. *— See also § 25-2-725 as to statute of limitations in contracts for sale.*

Statute Begins to Run When Breach Occurs. —

In accord with the fourth paragraph in the main volume. See Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The statute of limitations begins to run from the date that a contract is breached by failure to perform when required to do so under the contractual agreement, not from the first date when performance of the contract is possible. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Under subdivision (1) of this section, the period of limitations begins to run whenever the plaintiff's right to maintain an action accrues. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

The statute of limitations for contract actions is three years. The statute begins to run when the claim accrues; with a breach of contract action, the claim accrues upon breach. Abram v. Charter Medical Corp. of Raleigh, 100 N.C. App. 718, 398 S.E.2d 331 (1990), discretionary review denied, 328 N.C. 328, 402 S.E.2d 828 (1991).

Insured was not at liberty to assert a claim against defendant for uninsured motorist coverage as a consequence of insolvency of the tortfeasor's insurer until the date the insurance company was declared insolvent; therefore, the cause of action accrued on that date and the statute of limitations set out in subsection (1) began to run. North Carolina Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co., 115 N.C. App. 666, 446 S.E.2d 364 (1994).

A cause of action for breach of contract accrues at the time of the breach which gives rise to the right of action. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

A new promise to pay fixes, etc. —

A new promise to pay fixes a new date from which the statute of limitations for a contract action runs. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Modification of Original Agreement. — Although plaintiffs and defendants entered into the original contract in 1982 and held a closing with respect thereto in May 1983, they had reached a new agreement, or a modification of their original agreement, in January 1985 concerning the construction of a boat slip. Plaintiff husband testified he thought they had reached an "acceptable solution" at that point, but when he discovered that the boat slip was difficult to access and not constructed according to the agreed-upon plans in January 1986 and filed a complaint in June 1988, his filing was well within the three year period which began in January 1986. Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993).

Negligent Advice of Insurance Agent. — A cause of action for negligent advice of an insurance agent, brought by the beneficiary of a life insurance policy issued in reliance on that advice, accrues at the death of the insured, rather than at the time of the negligent advice. Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

A cause of action based on negligent advice rendered by an insurance agent does not involve professional malpractice, and the appropriate statute of limitations is the three-year period of subdivision (5) of this section, not § 1-15(c). Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

Creditor's demand for payment made by his counsel was not sufficient to invoke the acceleration clause and did not operate to start the limitations period running. Vreede v. Koch, 94 N.C. App. 524, 380 S.E.2d 615 (1989).

Running of Statute on Continuing Contract. — Where debtor signed note to creditor, creditor received last payment from debtor on January 1, 1980, final date of performance on note was October, 1985, and both debtor and guarantor defaulted on the note, the statute of limitations did not begin to run until the date that final performance was due, Oct. 1, 1985, because the parties' agreement was a continuing contract; continuing performance was possible where there was no evidence that creditor treated debtor's failure to pay as a total repudiation of the contract and debtor's failure to make the balloon payment due on Dec. 31, 1979, was not treated by creditors as a repudiation, nor were debtor's repeated failures to make monthly installment payments from Jan. 1, 1980. Vreede v. Koch, 94 N.C. App. 524, 380 S.E.2d 615 (1989).

Obligation Payable by Installments. — The general rule in the case of an obligation payable by installments is that the statute of limitations runs against each installment individually from the time it becomes due, unless the creditor exercises a contractual option to accelerate the debt, in which case the statute begins to run from the date the acceleration clause is invoked. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

Running of Statute on Breach of Lease Provision. — Breach of lease occurred when defendants failed to pay taxes as they came due. Upon breach, plaintiff's cause of action accrued as to the unpaid taxes, and the statute of limitations began to run. Clause in lease requiring that plaintiff give defendants notice of default and allow defendants to cure default within a specified period of time did not affect accrual of cause of action. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Effect of Remedies in Lease on Running of Statute. — When defendants defaulted by failing to pay taxes as they became due under lease, plaintiff had three basic remedies which he could exercise: He could immediately bring an action to enforce defendants' obligation to pay, or he could pay taxes himself as provided by the lease and then be reimbursed by the defendants, or he could give written notice of default and repossess the premises if not cured within the time period specified by the lease. Regardless of the alternative, each was but a remedy available to the plaintiff, which arose upon default as defined by the lease, and which had to be exercised, if at all, within the three year statute of limitations which began to run upon default. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Lease Obligation Payable by Installments. — Where defendants' tax obligation under lease was on an annual basis, the statute of limitations ran independently on each annual default. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

When compensation is to be provided in the will of the recipient, etc. —

Quantum meruit claims for services rendered pursuant to a contract to devise are controlled by the three-year statute of limitations of this section. When the agreed upon compensation is to be provided in the will of the recipient of the services, the cause of action accrues when the recipient dies without having made the agreed testamentary provision. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Accrual of Action for Attorneys' Fees Under Contingent Fee Contract. — An attorneys' action for the reasonable value of his services upon termination of his employment under a contingent fee contract does not accrue until the occurrence of the contingency stated in the contract. Clerk of Superior Court v. Guilford Bldrs. Supply Co., 87 N.C. App. 386, 361 S.E.2d 115 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

Accrual of Action Against Insurer for Legal Expenses. — Each legal expenditure incurred as a result of the insurer's refusal to defend creates a new right in the insured to recover such legal expenditures from the insurer; thus, given the three-year statute of limitations affecting contracts under subdivision (1) of this section, an insured has three years from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Accrual of Action Against Guarantor. —

An action on a guaranty not under seal must be commenced within three years of the breach triggering the obligation of the guarantors. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Suit by Surety on Surety Agreement. — Section 26-3.1 allows a surety to sue a principal on the original instrument or for reimbursement on the surety agreement. After three years, a suit on the latter theory would be barred by this section. Where a surety elects to sue on the underlying note under seal, he has the same rights the bank had on the original note. Thus, the 10-year statute of limitations, § 1-47, would apply. Adams v. Bass, 88 N.C. App. 599, 364 S.E.2d 194 (1988), cert. denied, 326 N.C. 363, 389 S.E.2d 810 (1990).

Action on Bond Accrued When Amount Established. — Because a bond stated that the defendant, as principal and defendant, as surety "will pay the full amount of the Lien Claim as established in any appropriate court proceeding," the defendant was not under any obligation to pay until an amount was established. The statute of limitations did not begin to run upon defendant's filing of the bond discharging the lien. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), aff'd, 330 N.C. 755, 412 S.E.2d 43 (1992).

A plaintiff's cause of action against a surety under § 20-288(e) begins to run when the fraud is discovered. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

The cause of action against a surety under a motor vehicle dealer surety bond arises at the time that the cause of action arises against the surety's principal. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

Causes of action of truck purchaser against dealer and dealer's surety under a motor vehicle dealer surety bond both arose when purchaser discovered dealer's breach of contract or fraud, and could accrue no later than the date on which purchaser filed a complaint against the dealer in the superior court. And as nothing prevented purchaser from joining both defendants in one action or from instituting a separate action against the surety while the case against the dealer was pending, the three-year statute of limitations of subdivision (1) of this section was not tolled. Bernard v. Ohio Cas. Ins. Co., 79 N.C. App. 306, 339 S.E.2d 20 (1986).

Repayment of Money Lent Under Verbal Agreement. — While, in general, the statute of limitations for a breach of contract is three years, money lent pursuant to a verbal agreement which fails to specify a time for repayment is payable within a reasonable time. The statute of limitations does not begin to run until a reasonable time for repayment has passed. Phillips & Jordan Inv. Corp. v. Ashblue Co., 86 N.C. App. 186, 357 S.E.2d 1, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Breach of warranty claims which arose in other states are governed by subdivision (1) of this section since remedies are governed by the laws of the jurisdiction where the suit is brought. The lex fori determines the time within which a cause of action shall be enforced. Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

As to when breach of contract by trademark licensor occurred, see Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

Federal ERISA Actions. — The North Carolina three-year statute of limitations for contract actions, codified at subdivision (1) of this section, is most analogous to a federal Employee Retirement Income Security Act (ERISA) action. Wise v. Dallas & Mavis Forwarding Co., 753 F. Supp. 601 (W.D.N.C. 1991).

B. Actions to Which Section Applies.

A lease agreement which a contract not under seal falls within a three-year statute of limitations. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Subcontractor's Action to Recover on Contractor's Surety Bond. — Subsection (1) of this section, which provides for a three-year statute of limitations, applies to subcontractor's action to recover on contractor's surety bond. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 187, 409 S.E.2d 913 (1991).

Action for Right to Contribution. — While the right to contribution among co-indemnitors or sureties has common law origin, since 1807 it has been a statutory right under the provisions of § 26-5; accordingly, the applicable statute in this case provided that an action upon a liability created by statute must be brought within three years. Finch v. Barnes, 102 N.C. App. 733, 403 S.E.2d 552, rev'd on other grounds sub nom. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Actions against an executor or trustee for breach of fiduciary duty are actions arising out of contract. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until there has been a demand and refusal. Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

A claim to stock was governed by the three-year limitations period of this section where the substantive right asserted was one of contract. American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985).

Action by Former Husband Against Former Wife to Declare Ownership Interest in Business. — The three-year contract limitations period provided in subdivision (1) is the applicable statute of limitations in a former husband's suit against his former wife and her incorporated fast-food restaurant franchise seeking a declaration of his ownership interest. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Claims Involving Bodily Injury as Essential Element. — The North Carolina Supreme Court has declined to apply § 25-2-725 to such claims where bodily injury to the person is an essential element of the cause of action and has instead adopted as the appropriate statute of limitation the three-year period contained in § 1-52(1). Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Damage to Property Caused by Defective Product. — Where the loss sought to be recovered was the damage to real property caused by a defective air conditioning unit, and not just an action to recover the value or a replacement of the unit based on the breach of warranty, the trial judge properly concluded the applicable limitation period was three years under this section. Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

Damages for Trespass to Land — A claim for damages for trespass to land is governed by a three-year statute of limitations, and laches is not a tenable defense to such an action. Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Actions Under ERISA Provisions. — This section applied to union employees' Employee Retirement Income Security Act (ERISA) action; employee's claims were most analogous to claims for breach of contract and, in addition, subdivision (2) contains applicable alternative limitations provisions. United Food & Com. Workers Local 204 v. Harris-Teeter Super Mkts., Inc., 716 F. Supp. 1551 (W.D.N.C. 1989).

Where union employees brought Employee Retirement Income Security Act

(ERISA) action against employer, employee's claims did not accrue until employers refused to comply with employee's request, as an individual, to be a participant in the employee benefits plan; the suit was filed in a timely fashion after employee's request was denied. United Food & Com. Workers Local 204 v. Harris-Teeter Super Mkts., Inc., 716 F. Supp. 1551 (W.D.N.C. 1989).

C. Actions to Which Section Not Applicable.

Constitutional Impairment of Contract. — The three year statute of limitations pursuant to this section did not apply to claim for a constitutional impairment of contract. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curium, 335 N.C. 158, 436 S.E.2d 821 (1993).

Contracts for the sale of "timber to be cut" are governed by Article 2 of the UCC, pursuant to § 25-2-107(2); accordingly, the controlling statute is § 25-2-725(1), which provides for a four-year period of limitation, not the three year statute of limitations in this section. Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

As Was Action Involving Sale of Mobile Home. — Where plaintiffs sought recovery solely for damage to their mobile home, which was manufactured by defendant, and because the sale of a mobile home is a "transaction in goods," the Uniform Commercial Code determined the rights of the parties; therefore, subsection (16) of this section was inapplicable. Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993).

D. Actions Held Barred.

Leaking Roof. — An action filed on June 11, 1981 against various defendants alleging breach of contract involving the construction of a defective roof was barred by the three year statute of limitations where plaintiff was aware in early 1975 that the roof had begun to leak, and made repeated complaints about leaks in many places over the next three years and thereafter. Asheville School v. D.V. Ward Constr., Inc., 78 N.C. App. 594, 337 S.E.2d 659 (1985), cert. denied, 316 N.C. 385, 342 S.E.2d 890 (1986).

E. Actions Not Barred.

Action on Retirement Benefits Contract. — Where plaintiff did not become eligible for retirement benefits until his retirement, the alleged breach of a retirement benefit contract could not have occurred until that time; because plaintiff brought this action within three years of defendants' refusal of his demand for benefits, his action was not barred by the statute of limitations. Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

Defense of Laches Held Unavailable. — Where lessees' right to sue subtenant for nonpayment of taxes under lease was not conditional upon lessor first suing lessees for nonpayment of the taxes, the lessor's delay in suing lessees for nonpayment of taxes under the lease was immaterial and did not prejudice defendants' claim under the sublease. Thus, defense of laches was unavailable. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Where lessees entered into a number of subleases during term of lease and subleases to pay taxes, and sublessees and lessees failed to pay taxes under lease or sublease, lessor's suit against lessee was not barred by laches even though statute of limitations had run on some of the unpaid taxes. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Defendant Equitably Estopped from Pleading the Statute of Limitations. — The defendant, who had a contractual obligation to pay the plaintiff for services rendered to his son, was equitably estopped from pleading the statute of limitations as a bar to the plaintiff's cause of action, where the trial judge, as trier of fact, found that the defendant's attorney made statements to the plaintiff which caused the plaintiff to reasonably believe it would receive payment once the court action between the defendant and the insurer was decided. Duke Univ. v. Stainback, 84 N.C. App. 75, 351 S.E.2d 806, aff'd, 320 N.C. 337, 357 S.E.2d 690 (1987).

III. LIABILITY CREATED BY STATUTES.

This section is applicable to 42 U.S.C. § 1981 actions, etc. —

This section applies to an action alleging racial discrimination in violation of 42 U.S.C. § 1981 and serves as a three year cap on back pay. Kornegay v.

Burlington Indus., Inc., 803 F.2d 787 (4th Cir. 1986).

Subdivision (2) Governs Actions Under 42 U.S.C. §§ 1981 and 1983. — Since there is no federal statute of limitation governing 42 U.S.C. §§ 1981 and 1983, the appropriate limitation period is the most relevant period provided by State law. The most relevant period provided by North Carolina law is subdivision (2) of this section. Lugo v. City of Charlotte, 577 F. Supp. 988 (W.D.N.C. 1984).

The three-year limitation period established by this section applied to § 1983 claim where plaintiff sought to determine whether the imposition of an earnings cap in a disability pension plan after the beneficiary vested in the plan violated the U.S. Constitution, and began to run only when he was actually being paid above the earnings cap, and not when the plaintiff was required for the first time to report his previous year's earnings to the Local Retirement System pursuant to § 128-27(e)(4). Kestler v. North Carolina Local Governmental Employees' Retirement Sys., 808 F. Supp. 1220 (W.D.N.C. 1992).

Subdivision (5) Applicable to 42 U.S.C. § 1983 and § 1981 Actions. — Subdivision (5) of this section was the applicable statute of limitation governing a 42 U.S.C. § 1983 action based upon charges against police officials of illegal seizure and use of excessive force. The court's decision as to this issue will also govern § 1981 actions. Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988).

Section 25-3-419 Liability. — Subdivision (2) of this section might arguably apply to case which arose "upon a liability created by statute," namely § 25-3-419. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Claims under section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411-(a)(2), are governed by state general or residual personal injury statutes, which are to be identified in conformity with the United States Supreme Court decision in Owens v. Okure, 488 U.S. 886, 109 S. Ct. 214, 102 L. Ed. 2d 206 (1988); Reed v. United Transp. Union, 488 U.S. 319, 109 S. Ct. 621, 102 L. Ed. 2d 665 (1989).

Action Under Oil Pollution and Hazardous Substances Control Act Held Barred. — Subdivision (2) of this section barred an action brought under the state Oil Pollution and Hazardous Substances Control Act of 1978, § 143-215.75, where plaintiff waited longer than three years after discovering the contamination to file the action. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Contribution Claims. — The legislature has failed to fix a time in § 1B-3(d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two-year statute of limitations set out in § 1-53(1), which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three-year statute in subdivision (2) of this section "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

The doctrine of laches is not applicable to an action for retroactive child support; the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in subdivision (2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The sole limitation on a party's

right to reimbursement for documented past support expenditures is imposed by subdivision (2) which limits recovery to those expenditures incurred within three years before the date the action for support is filed. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

Recovery for Past Child Support Expenditures. — Assuming adequate proof of the expenditures under § 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures: (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

IV. TRESPASS UPON REALTY.

Meaning of "Continuing Trespass," etc. —

In accord with original. See Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

The statute of limitations on claims for continuing trespass and nuisance begins to run from the first act of trespass, however, where the trespass is recurrent, as opposed to continuing, the limitations period does not bar the claim. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

Recurrent Trespass Not Barred. — Where evidence showed that plaintiffs' well was contaminated with gasoline when action for nuisance and trespass was filed and indicated continuing gasoline leakage at that time, the trespass was recurrent and thus plaintiffs' trespass and nuisance claims were not barred by subdivision (3). James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

Summary judgment based on statute of limitations was inappropriate on claims brought in 1988 under the Oil Pollution and Hazardous Substances Control Act (143-215.75 et seq.) and for negligence, premised on contamination of well water with gasoline, where plaintiffs did not associate the bad taste in their well water with gasoline until 1986, several years after they stopped drinking it, and in that same year were officially informed that their water was contaminated with gasoline. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

Wrongful maintenance of a portion of the defendants' dwelling house on the plaintiffs' lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs' land. Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of 20 years so as to acquire the right by prescription. Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

An action for the "fair rental value" of occupied property was brought upon a statutory liability (i.e., § 42-4; recovery for use and occupation) and was subject to the three-year statute of limitation provided for in subdivision (2) of this section. Such a cause of action accrued continually, for each day the property was occupied. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (§ 28A-19-3) and was therefor not barred by the three-year statute of limitations of this section as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

V. GOODS OR CHATTELS.

In General. — If an action is one for conversion, it is clear that subsection (4) of this section is applicable. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Accrual of Conversion Action. — The general rule appears to be that conversion actions accrue upon the conversion itself rather than upon its discovery. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Plaintiff's cause of action for each alleged conversion accrued at the time of that particular conversion. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

The "discovery rule," codified at subdivision (16) of this section, does not apply to conversion actions. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Nonapplicability of Subdivision (16) in Conversion Actions. — The statute of limitations for conversion is clearly one "otherwise provided by statute" thereby excluded from the purview of subdivision (16) of this section. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Subdivision (4) of this section is a separate and distinct subsection, enacted independently from subdivision (16) and contains no provision that would indicate that it is subject to subdivision (16). Had the legislature intended such connection or intended for the statute of limitations for conversion to be subject to the discovery rule, it could have expressly indicated that intention such as was done in subdivision (9) of this section, the statute of limitations for fraud actions. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

In a conversion action, when the parties separated and plaintiff moved to a smaller apartment with limited storage space, and defendant retained lawful possession of the goods at the marital residence, but at the time of separation there was no evidence that plaintiff manifestly intended to abandon the property or that defendant exercised unauthorized dominion over it to her exclusion, the statute of limitations did not begin to run until defendant changed the locks on the residence after plaintiff asserted her continuing interest in the remaining property and her desire to remove it at some future time. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

Conversion Action Held Barred. — Where a case was filed more than three years after the last alleged act of conversion, the action was barred by the statute of limitations. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

VI. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Subdivision (5) Applicable Absent Other Specific Limitation. — On its face, subdivision (5) of this section appears to apply to all actions for personal injuries that are not specifically enumerated elsewhere in a distinct statute of limitation. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Subdivision (5) Applicable to 42 U.S.C. § 1983 and § 1981 Actions. — Subdivision (5) of this section was the applicable statute of limitation governing a 42 U.S.C. § 1983 action based upon charges against police officials of illegal seizure and use of excessive force. The court's decision as to this issue will also govern § 1981 actions. Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988).

Subdivision (5) Applicable to Bivens Actions. — The appropriate limitations period for an actionable constitutional tort under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), is North Carolina's three-year personal injury statute of limitations. Mallas v. Kolak, 721 F. Supp. 748 (M.D.N.C. 1989), modified, 993 F.2d 1111 (4th Cir. 1993).

Applicability of Three-Year, etc. — An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Considering the fact that no notice of claims was published by the personal representative of decedent's estate previous to plaintiff's filing of personal injury action by injured passenger, it was clear that plaintiff's claim was not barred by the three-year statute of limitations set out in this section. Lassiter v. Faison, 111

N.C. App. 206, 432 S.E.2d 373, cert. denied, 335 N.C. 174, 436 S.E.2d 381 (1993).

Emotional Distress Claims. — By its terms, § 1-52(16) applies to "personal injury," a phrase that would seem to include emotional distress. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

Because there is no evidence that the legislature deliberately omitted reference to emotional distress claims, that reason for excepting them from the period of repose does not exist. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

Intentional Infliction, etc. —

Because it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of subdivision (5) of this section. King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Sexual Harassment Involving Continuing Conduct. — In a sexual harassment case, the trial court properly admitted evidence of defendant's actions occurring more than three years before the action was filed, where the actions were part of defendant's continuing conduct, contributed to plaintiff's emotional distress, and caused her to visit medical professionals. Bryant v. Thalhimer Bros., 113 N.C. App. 1, 437 S.E.2d 519 (1993), cert. denied and appeal dismissed, 336 N.C. 71, 445 S.E.2d 29 (1994).

Absence of Discovery Provision in Subdivision (5). — The North Carolina General Assembly has not included a "discovery provision" in subdivision (5) of this section; that omission is significant because the General Assembly has included a discovery provision in other statutes such as subdivision (16) of this section. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

A residential structure may be considered "new" for warranty purposes within the maximum statute of limitations period. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

A residential structure which is approximately four and a half years old at the time of the sale from the builder-vendor to the initial purchaser may be considered to be a "new dwelling" for implied warranty purposes. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

Exclusion of Testimony. — The trial court in a negligence action ruled correctly in excluding testimony where the time period inquired about was outside the three years prior to the institution of the action. Wells v. French Broad Elec. Membership Corp., 68 N.C. App. 410, 315 S.E.2d 316, cert. denied, 312 N.C. 498, 322 S.E.2d 565 (1984).

Accrual of Action Based on Disease. — The first identifiable injury occurs when a disease is diagnosed as such, and at that time it is no longer latent. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

An action based on disease-related claims is not barred by the statute of limitations for personal injury actions under this section, so long as the action is filed within three years after plaintiff's illness is first diagnosed. Guy v. E.I. DuPont de Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

VII. SURETIES OF EXECUTORS, ETC.

Presence of Seal Immaterial. —

The statute of limitations barring actions against defendants as sureties is this section, and not § 1-47(2), notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Instrument Held Contract of Suretyship. — Instrument executed and delivered by defendant to plaintiff's predecessor, which provided that defendant's obligation would be a primary and not a secondary obligation, payable immediately upon demand without recourse first having been had against the borrower or any other person or property, was a contract of suretyship, notwithstanding the instrument's title of "Guaranty Agreement." Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C.

App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

X. FRAUD OR MISTAKE.

A. In General.

Editor's Note. *— All of the case notes which previously appeared in the main volume and cumulative supplements under analysis line X., Fraud or Mistake, have been reprinted below, along with annotations taken since the publication of the 1990 Cumulative Supplement. The reprinting of these case notes was necessary to accommodate new case note analyses.*

Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated that fraud is better left undefined, lest the craft of men should find a way of committing fraud which might escape a rule or definition. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Fraud may be said to embrace all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Meaning of "Relief on the Ground of Fraud". — The words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress and undue influence. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

It will be noted from the language, "relief on the ground of fraud" that subdivision (9) of this section has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and clearly applies to any and all actions, legal or equitable, where fraud is the basis of an essential element of the action. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970). See also, Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

It is difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Where there is concealment of fraud or continuing fraud, the statute does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Nature of Substantive Right Determinative of Period of Limitations. — The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. A declaration that one is a constructive trustee may be an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that plaintiff seeks it is irrelevant to the question of limitations. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

Effect of Nonresidence of Plaintiff. — The nonresidence of a plaintiff claiming lands here under an allegation of fraud, etc., did not affect the running of the statute of limitations adverse to his demand in his action. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

A nonresident creditor who sought to set aside a deed of his debtor for fraud was not excused by his absence for not complying with the provisions of this section requiring that he must bring his action within three years from the discovery of the fraud. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

B. Applicability.

Actions for fraud are not subject to the 10-year limitation of former subsection (b) of § 1-15, (see now subdivision (16) of this section) since subdivision (9) of this section is a statute that otherwise provides as to the time of accrual of such actions. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (9) Applicable to All Actions Grounded on Fraud or Mistake. — While subdivision (9) of this section originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of North Carolina courts it now applies to all actions for relief on the ground of fraud or mistake. Stancill v. Norville, 203 N.C. 457, 166 S.E. 319 (1932).

Fraud or Mistake Prerequisite to Application. — Subdivision (9) of this section has no application to an action to recover money, where there is no evidence or allegation of fraud and mistake. Barden v. Stickney, 132 N.C. 416, 43 S.E. 912 (1903); Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Subsection (9) applies to a claim for negligent misrepresentation against an insurance company since that claim is essentially one for mistake. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

Forgery as Fraud. — An action to set aside a deed on the grounds of forgery is an action for relief on the grounds of fraud, and such an action is barred after three years from the date of knowledge of the forgery. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

Section Held Applicable — Action to Set Aside Guardian's Settlement. — The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. Wheeler v. Piper, 56 N.C. 249 (1857); Whedbee v. Whedbee, 58 N.C. 392 (1860); Spruill v. Sanderson, 79 N.C. 466 (1878); State v. Smith, 83 N.C. 306 (1880).

Same — Action to Set Aside Conveyance of Equity of Redemption. — An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee was an action based on fraud and had to be instituted within three years from the discovery of the acts constituting the fraud, and the 10 year statute had no application. Massengill v. Oliver, 221 N.C. 132, 19 S.E.2d 253 (1942).

Same — Action for Damages for Obtaining Deed by Fraud. — In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907).

Same — Inadequate Consideration Due to Fraudulent Influence. — This section applied to suit to recover the difference between grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor, and the reasonable value thereof, and it was reversible error for the trial judge to hold, as a matter of law, that the 10-year statute relating to actions to impress a trust upon property only was applicable. Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

Same — False Material Statements in Insurance Application. — Whether considered fraud in the broad sense or mistake, subdivision (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Same — Embezzlement by Court Clerk. — Where a clerk of the superior court embezzled funds and such fraud was not discovered until about 90 days prior to institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 1-50 applied. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931); State ex rel. Pasquotank County v. American Sur. Co., 201 N.C. 325, 160 S.E. 176 (1931).

Section Not Applicable to Action to Remove Cloud from Title. — The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. Cauble v. Trexler, 227 N.C. 307, 42 S.E.2d 77 (1947).

Nor to Resulting or Constructive Trusts. — A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954).

Action by Corporation to Impose Resulting Trust. — An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Section Held Applicable in Action to Impose Constructive Trust. — Where plaintiff specifically alleged fraud, or, alternatively, mistake as the basis for imposing a constructive trust on proceeds from certain stocks, the three-year limitation set forth in this section would apply. J. Lee Peeler & Co.

v. Makepeace, 96 N.C. App. 118, 384 S.E.2d 283 (1989).

C. When Cause Accrues.

Actions involving fraud or mistake shall not be deemed to have accrued until discovery. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Hice v. Hi-Mil, Inc., 47 N.C. App. 427, 267 S.E.2d 507 (1980), aff'd, 301 N.C. 647, 273 S.E.2d 268 (1981).

The three-year statute of limitations for fraud or mistake does not commence to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Or From When Fraud or Mistake Should Have Been Discovered. — The statute runs from the discovery of the fraud or mistake, or from when it should have been discovered in the exercise of ordinary care. Sinclair v. Teal, 156 N.C. 458, 72 S.E. 487 (1911). See also, Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Peacock v. Barnes, 142 N.C. 215, 55 S.E. 99 (1906).

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Wimberly v. Washington Furn. Stores, Inc., 216 N.C. 732, 6 S.E.2d 512 (1940); Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970); Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973); Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976); Cowart v. Whitley, 39 N.C. App. 662, 251 S.E.2d 627 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980); Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

In actions for relief from real estate transactions infected by mistake or fraud, the cause of action accrues when discovery was or should have been made by the exercise of ordinary diligence. Fulcher v. United States, 696 F.2d 1073 (4th Cir. 1982).

Where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations. The law regards the means of knowledge as the knowledge itself. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

The statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

The limitation period begins to run from the time the mistake is discovered or should have been discovered. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987), aff'd, 89 N.C. App. 721, 367 S.E.2d 3 (1988).

A cause of action grounded in fraud must be brought within three years of the date when the fraud is discovered or should have been discovered in the exercise of reasonable diligence. York v. Golden Poultry Co., 883 F. Supp. 32 (E.D.N.C. 1995).

Regardless of Length of Time between the Act and the Discovery. — Under subdivision (9) of this section, the three-year limitation for an action for fraud accrues at the time of discovery, regardless of the length of time between the fraudulent act or mistake and discovery of it. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Knowledge of Law Not Required for Action to Accrue. — Knowledge of the law governing alleged fraud is not included in the requirement under subdivision (9) of this section as to knowledge of the facts constituting the alleged fraud. Hiatt v. Burlington Indus., Inc., 55 N.C. App. 523, 286 S.E.2d 566, cert. denied, 305 N.C. 395, 290 S.E.2d 365 (1982); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake, and not from the discovery by a party of rights hitherto unknown to him. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

This statute begins to run from

time of discovery of breach of trust relationship and not from the time the relation was brought to an end. Egerton v. Logan, 81 N.C. 172 (1879).

Running of Statute Against Action to Reform Instrument for Mutual Mistake. — The three-year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence; conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950).

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. Jefferson v. Roanoke R.R. & Lumber Co., 165 N.C. 46, 80 S.E. 882 (1914). See also, Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890).

Running of Statute Against Action for Negligent Misrepresentation. — While an action for negligent misrepresentation of an insurance contract does not accrue before the misrepresentation is discovered, neither does it accrue until the misrepresentation has caused claimant harm. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

D. Discovery of Fraud or Mistake.

"Discovery" means actual discovery or the time when the fraud should have been discovered in the exercise of due diligence. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

Reasonable Diligence. — Where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so, the absence of reasonable diligence is established as a matter of law. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Burden on Plaintiff to Show Both Ignorance of Facts and Diligence. — It is incumbent upon plaintiff to show not only that he was ignorant of the facts upon which he relies in his action, but also, that he could not have discovered them in the exercise of proper diligence or reasonable business prudence. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922). See also, Johnson v. Pilot Life Ins. Co., 219 N.C. 202, 13 S.E.2d 241 (1941); Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

The burden is on the plaintiffs to show that neither they nor their predecessor in title knew of the fraud, or would have discovered it in the exercise of reasonable business prudence. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

As to plaintiff's burden of proof, see also Hooker v. Worthington, 134 N.C. 283, 46 S.E. 726 (1904); Taylor v. Edmunds, 176 N.C. 325, 97 S.E. 42 (1918); Willetts v. Willetts, 254 N.C. 136, 118 S.E.2d 548 (1961).

Effect of Confidential Relationship or Duty to Use Diligence. — Failure to discover the facts constituting fraud may be excused where a confidential relationship exists between the parties, yet failure of the defrauded party to use diligence in discovering the fraud is not wholly excused merely because a relation of trust and confidence exists between the parties. Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

The existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence. However, a failure to use due diligence is not always excused by the existence of such a relationship. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Whether Plaintiff Should Have Discovered Facts Is Ordinarily for Jury. — In an action to reform a deed on grounds of mistake, whether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflict-

ing. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980).

Whether plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Whether plaintiff failed to exercise due diligence in discovering his mistake or whether he assumed the risk of a mistake are questions of fact to be determined by a jury. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987), aff'd, 89 N.C. App. 721, 367 S.E.2d 3 (1988).

Discoverability of Mistake Is a Factual Question. — Whether a discrepancy or mistake in a deed or other document should be discovered in the exercise of reasonable diligence depends upon the circumstances of each case and is ordinarily a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

When Due Diligence Determined as Matter of Law. — In an action to reform a deed on grounds of mistake, failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

Mere registration of a deed, standing alone, will not be imputed for constructive notice. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

When Registration of Deed Is Notice of Fraud. — The mere registration of a deed containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to discovery of the facts constituting the fraud. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951). See also, Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907); Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907); Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

Action for Reformation of Deed. — In a reformation of deed case, mistake or discrepancy in deed that plaintiff complains of should have been discovered through the exercise of due diligence when plaintiff filed its declaration converting the apartment complex to condominiums, as plaintiff had a positive duty to exercise reasonable care in describing the converted land. Plaintiff had both the capacity and the opportunity to discover that tract was not included in the deed by simply comparing the deed legal description with the survey of the property that it had recently received. Cause of action accrued then, not when it was later actually discovered. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Cause of action for reformation of deed accrued not when plaintiff discovered that the adjacent parcel of land was not included in the deed, but when that fact should have been discovered in the exercise of reasonable diligence. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Dismissal of Cross Action Filed More Than Three Years from Discovery of Fraud. — Where defendant in his answer alleged that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and filed a cross action against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three-year statute of limitations was upheld. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961).

Newly Discovered Evidence Held Necessary in Action to Reconsider. — Plaintiff could derive no aid from this section in an action to reconsider a case which had been sanctioned by the court and settled by a decree from it in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at the time of the first action, the first action would stand notwithstanding this section. Spruill v. Sanderson, 79 N.C. 466 (1878).

E. Actions Held Barred.

Where as early as 1971 plaintiff had warning that supposed husband was still married to another woman, her action for fraud filed in January, 1980, was barred by this section. Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

Proceedings before clerk to sell trust lands to make assets to pay the debts of the deceased, and the open, notorious and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any, committed by the executor, and would bar their right of action within three years therefrom. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

Foreclosure Sale Where Timber Sold Separately. — Where a foreclosure sale of lands was attacked for fraud upon the ground that the trustee sold the timber on the land separately from the land and made deeds to each to separate parties, which were duly recorded, the record itself gave notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claimed, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and barred their recovery after three years. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

Where plaintiff acquired title to real estate, subject to a contract to cut timber within three years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was three years, the action was barred by this section. Blankenship v. English, 222 N.C. 91, 21 S.E.2d 891 (1942).

Cause of action for reformation of bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. Moore v. Fidelity & Cas. Co., 207 N.C. 433, 177 S.E. 406 (1934). See also, in this connection, Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934); Hood v. Paddison, 206 N.C. 631, 175 S.E. 105 (1934).

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk, it was held that insured should have been put on notice thereby that company's agent's promise to redeliver a second policy within seven months after it was tendered to insured and refused because of illness was false, and that insured's claim, if he had any, had atrophied as a result of his procrastination and was barred by this section. Jones v. Bankers Life Co., 131 F.2d 989 (4th Cir. 1942).

Where plaintiffs contended that usurious interest was paid by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although it was instituted more than two years after the last usurious payment, it was held that plaintiffs were not entitled to invoke the statute, as they did not institute action until more than three years after they had executed a note bearing six percent interest in renewal of the original note upon which usury was paid, and that they were negligent in asserting their rights, if any. Ghormley v. Hyatt, 208 N.C. 478, 181 S.E. 242 (1935).

Cause of Action to Set Aside Deed for Fraud and Undue Influence. — Where it was established that the person under whom plaintiffs claimed was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim was barred. Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged cause of action for fraud, the action was barred by subdivision (9) of this section. Nowell v. Hamilton, 249 N.C. 523, 107 S.E.2d 112 (1959).

Alleged Misrepresentations of Doctor. — The trial court did not err in entering summary judgment as to plaintiff's claim based on fraud where the evidence showed that plaintiff learned in

April 1983 of the alleged misrepresentations of his doctor regarding his experience in gastroplasty procedures and did not file an action until August 1986. Foard v. Jarman, 93 N.C. App. 515, 378 S.E.2d 571 (1989), rev'd on other grounds, 326 N.C. 24, 387 S.E.2d 162 (1990).

F. Actions Not Barred.

Where a reversionary clause was omitted from a deed by mistake of the draftsman, the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Where defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land, and he surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor, and the grantor died some three years and seven months thereafter, there being nothing to rebut the inference that she retained possession of the property until her death, it was held that as there was nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, was not barred. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

In an action to recover damages for fraudulent representations as to amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered or should have been discovered by them in the exercise of reasonable diligence. Swinton v. Savoy Realty Co., 236 N.C. 723, 73 S.E.2d 785 (1953), overruled on other grounds, Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

In interpleader action by insurance carrier to determine the right to the proceeds of a life insurance policy, where husband and wife did not know of carrier's misrepresentation prior to husband's death, the action did not accrue before his death on July 10, 1988; the counterclaim filed on February 20, 1991, was therefore brought within three years of the accrual of the cause of action and, thus, wife's claim was not barred by the statute of limitations. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

XI. FAIR LABOR STANDARDS ACT.

Federal Statute of Limitation Preempts Conflicting State Provision. — Subdivision (11) of this section is invalid under the force of the Supremacy Clause, and the federal two-year statute of limitation is the applicable statute. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Because the Fair Labor Standards Act (F.L.S.A.) has been duly adopted by Congress and because it was enacted pursuant to the Commerce Clause of the federal Constitution, any state law promulgated in conflict with it must yield under the force of the Supremacy Clause. In that the state three-year statute of limitation directly conflicts with the federal two-year statute of limitation, the federal statute must prevail. The federal statute of limitation reflects a purpose and objective of Congress to establish a uniform, two-year limitations period governing all claims filed pursuant to the F.L.S.A. North Carolina's three-year statute of limitation, therefore, "stands as an obstacle to the accomplishment and execution" of this purpose and objective. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

XII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Public Policy. — As § 1-50(6) and subdivision (16) of this section make clear, the public policy of this State is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of the allegedly defective product and long after a defendant participated in its manufacture or design. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

Primary purpose of subdivision (16) appears to have been the adoption of the "discovery" rule. That is, it was intended to apply to plaintiffs with latent injuries. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Integrated Statutory Schemes. — Subdivision (16) of this section was not meant to be applicable to specialized causes of action provided for in integrated statutory schemes such as found in Article 3 of Chapter 25. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

"Physical damage," within the context of subdivision (16) of this section, was meant to be literally interpreted. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

The North Carolina courts have clearly not expanded the meaning of "physical damage to property" beyond the traditional meaning of the phrase. Its application has been limited to cases wherein latent damages have been discovered in the form of personal injuries or physical damage to property. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Statute of Repose and Child Abuse. — Plaintiff reasoned that a period of repose bar to a claim such as hers is especially unfair because child abuse is widespread, usually without witnesses, rarely reported because the victim feels ashamed or intimidated or suppresses memories of the abuse, and not sufficiently deterred by criminal sanctions; while these points are compelling, they are appropriately addressed to a legislative, not a judicial, body. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

Subdivision (16) Modifies Common Law. — The well established common law rule has long been that "when the right of the party is once violated, even in ever so small a degree, the injury, in the technical acception of that term, at once springs into existence and the cause of action is complete." Subdivision (16) of this section modifies the common law rule in that it requires discovery of bodily harm to the claimant or physical damage to his property before a cause of action can accrue. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Subdivision (16) modifies the common-law rule that once the right of a party is violated, the cause of action is complete in the case of latent damage only to the extent that it requires discovery of physical damage before a cause of action can accrue; it does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985).

The 10-year statute of repose does not create a special class of defendants. Instead, the statute applies to any defendant where a plaintiff can allege a cause of action having as an essential element bodily injury to the person which originated under circumstances making the injury not readily apparent to the claimant at the time of its origin. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (16) of this section does not adversely affect claimants with latent diseases, but actually expands their rights and opportunities to recover. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Subdivision (16) of this section modifies the sometimes harsh common law rule so as to protect a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. However, that is the extent to which the common law rule is changed; as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run; it does not matter that further damage could occur, such further damage being only aggravation of the original injury. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

Accrual When Wrong is Complete. — An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues; the cause of action accrues when the wrong is complete. Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Date of Discovery Rule. — Plaintiffs with injuries not readily apparent at the time of injury are not charged with notice of the injury until discovery — a great benefit to plaintiffs. Defendants in such cases have lost the old protection of accrual being determined by the date of injury (even though the injury may not have been known to the plaintiff). Defendants have, however, received the balancing consideration (10-year statute of repose) giving them some protection from stale claims. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The Legislature in adopting the date of discovery rule improved the lot of certain plaintiffs, but also considered the rights, duties and obligations of potential defendants. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Prior to the enactment of former subsection (b) of § 1-15 (see now subdivision (16) of this section), North Carolina plaintiffs were subject to a strict common-law rule that the cause of action accrued at the time of the occurrence of any injury, however slight, regardless of whether the plaintiff was aware of the injury. By adopting the "discovery rule" the accrual of a cause of action was postponed until the plaintiff knew or should have known of his injury. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

This statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985).

Subdivision (16) of this section modifies the common law rule on accrual of actions only insofar as it requires discovery of physical damage before a cause of action can accrue; it does not change the fact that once some physical damage has been discovered, the injury springs into existence and completes the cause of action. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

The statute of limitations for plaintiff's cause of action did not accrue until physical damage to her townhouse became apparent in October, 1990 when the carpeting was removed to reveal rotting floorboards. It was then that the three-year statute of limitations enumerated in subdivision (5) began to run. Plaintiff then had three years from the time she discovered the latent defects (October 1990) to file suit. Plaintiff's filing, within the three-year limitations period, was also well within the 10-year statute of repose which began to run on December 7, 1984 when defendant sold the townhouse to plaintiff. Cage v. Colonial Bldg. Co, 111 N.C. App. 828, 433 S.E.2d 827 (1993), cert. granted, 335 N.C. 553, 441 S.E.2d 111 (1994).

Discovery of Further Damage. — Where plaintiff clearly knew more than three years prior to bringing suit that it had a defective roof, yet took no legal action until the statute of limitations had run, the fact that further damage which plaintiff did not expect was discovered did not bring about a new cause of action so as to preclude summary judgment in defendant's favor. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

Three Year Statute of Limitations and Wrongful Death Claim. — The three-year statute of limitations period of this section for a bodily injury claim does not trigger the running of, nor cut short, the period for filing a wrongful death action when the underlying bodily injury claim of the decedent was not time-barred at his death. The proviso in subdivision (4) of this section merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Personal injury claim of individual suffering asbestosis accrued on the date he was diagnosed as having the disease asbestosis, and under subdivision (16) he had three years from that date to bring suit. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

In occupational disease cases, a cause of action grounded in negligence accrues when the disease is diagnosed. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Gasoline supplier was not liable for underground seepage of gasoline, where the evidence did not show that it had "control" over the gasoline less than ten years prior to the time the action was filed. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Applicability to Right of Subroga-

tion. — Where insured property was damaged by the tortious act of another and the insurance paid the owner of the property covered the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation of the owner's indivisible cause of action against the tort-feasor, but where the statute of limitations would have run on the property owner's right to file the cause of action, plaintiff insurance company also lost its right to file the suit after that date. Aetna Cas. & Sur. Co. v. Anders, 116 N.C. App. 348, 447 S.E.2d 504 (1994).

Third-party complaint against previous landowners for alleged contamination of an adjacent property resulting from gasoline seepage was properly dismissed, where the landowners had sold the property more than ten years before plaintiff filed the original action. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Not Applicable to Claim Arising from Improvement to Real Property. — Subsection (16) has no application to a claim arising out of improvement to real property; the real property improvement statute of repose at § 1-50(5) applies exclusively to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

XIII. FIRE INSURANCE POLICY CLAIM.

Application of Subdivision (12). — The language of this section does not require that subdivision (12) be applied in conjunction with or subject to the provisions of subdivision (16) of this section. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Inclusion of Standard Fire Insurance Policy Limitation Period. — By enacting subdivision (12) of this section, the General Assembly intended only to include the standard fire insurance policy limitation period in the comprehensive list of actions which are generally subject to three-year periods of limitation and to provide a cross-reference between general statutory periods of limitation contained in this section, and the more specific limitation provisions of the Standard Fire Insurance Policy for North Carolina set out in § 58-44-15(c). Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Application of Subdivision (16) Precluded by the Standard Fire Insurance Policy Limitation Provision. — The standard fire insurance policy limitation provision, contained in subdivision (12) of this section and § 58-44-15(c) and reproduced in plaintiffs' policy of homeowner's insurance, constituted a limitation period "otherwise provided by statute," which precluded the applicability of subdivision (16) of this section to the action. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

§ 1-53. Two years.

Legal Periodicals. —

For note, "Judicially Imposed Usury Penalties in the Absence of Statutory Penalties: Can Freedom of Contract Co-Exist with Public Policy After Merritt v. Knox?," see 68 N.C.L. Rev. 1021 (1990).

CASE NOTES

I. In General.
II. Contractual Obligations of Local Governmental Units.
V. Death by Wrongful Act.

I. IN GENERAL.

Applied in Cooke v. Town of Rich Square, 65 N.C. App. 606, 310 S.E.2d 76 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984);

Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Merritt v. Knox, 94 N.C. App. 340, 380 S.E.2d 160 (1989); Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994), cert. granted, 339 N.C. 609, 454 S.E.2d 246 (1995).

Cited in Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); Medford v. Haywood County Hosp. Found., 115 N.C. App. 474, 444 S.E.2d 699, cert. granted, 337 N.C. 802, 449 S.E.2d 747 (1994); Adams v. Beard Dev. Corp., 116 N.C. App. 105, 446 S.E.2d 862 (1994).

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two-year statute of limitations set out in subdivision (1) of this section, which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three-year statute in § 1-52(2) "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

V. DEATH BY WRONGFUL ACT.

Construction of "Would Have Been Barred". — The phrase, "would have been barred" in subdivision (4) of this section is in the past subjunctive tense; it must, therefore, refer to a past event — an event, in other words, that occurred before decedent's death. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Two-Year Period Not Applicable to Sentencing Proceedings. — In the context of sentencing proceedings under § 15A-1343(d), the two-year statute of limitations in subdivision (4) of this section pertaining to actions instituted under the wrongful death act is not applicable. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Entry of Order and Service of Process After Two Year Period. — Where order allowing the plaintiff's motion to amend related back to the date the motion was filed, thus making the motion and the included amended complaint valid within the two year statute of limitations for a wrongful death action, the fact that the order was entered and actual service of process on the new defendants occurred after the two year period was of no legal significance, since the action was sufficiently commenced by filing the motion and amended complaint together, which was later allowed by order. Flood v. Hardy, 868 F. Supp. 809 (E.D.N.C. 1994).

Wrongful Death Action Not Extended by § 1-15(c). — Section 1-15(c) would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to subdivision (4) of this section. King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Section 1-52(16) and Claims for Wrongful Death. — The three-year statute of limitations period of § 1-52(16) for a bodily injury claim does not trigger the running of, nor cut short, the period for filing a wrongful death action when the underlying bodily injury claim of the decedent was not time-barred at his death. The proviso in subdivision (4) of this section merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Action Held Not Barred. — Decedent's liver cancer was diagnosed on August 29, 1985. Decedent's bodily injury claim, had he lived, would have accrued on August 29, 1985 and would have been time-barred three years later under § 1-52(16). Decedent died on June 24, 1987. On that date, his bodily injury claim would not have been time-barred. Thus, this wrongful death claim, having been filed within two years of decedent's death, was not time-barred by any of the provisions of § 1-53(4). Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

§ 1-54. One year.

Within one year an action or proceeding —

(1) Repealed by Session Laws 1975, c. 252, s. 5.

(2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3) For libel, slander, assault, battery, or false imprisonment.

(4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern.

(7) Repealed by Session Laws 1971, c. 939, s. 2.

(7a) For recovery of damages under Article 1A of General Statutes Chapter 18B.

(8) As provided in G.S. 105-377, to contest the validity of title to real property acquired in any tax foreclosure action or to reopen or set aside the judgment in any tax foreclosure action.

(9) As provided in Article 14 of Chapter 126 of the General Statutes, entitled "Protection for Reporting Improper Governmental [Government] Activities". (C.C.P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C.S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2; 1975, c. 252, s. 5; 1977, c. 886, s. 3; 1983, c. 435, s. 38; 1989, c. 236, s. 4.)

Editor's Note. —
The title of Article 14 of Chapter 126, referred to in subdivision (9) of this section, is "Protection for Reporting Improper Government Activities."

Session Laws 1989, c. 236, s. 4, which added subdivision (9), was effective October 1, 1989 and was applicable to acts incurring liability on and or after October 1, 1989.

CASE NOTES

I. In General.
II. Actions for Penalty or Forfeiture.
III. Libel, Slander, Assault, Battery and False Imprisonment.

I. IN GENERAL.

Applied in Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988); Dunn v. Town of Emerald Isle, 722 F. Supp. 1309 (E.D.N.C. 1989).

Stated in Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Cited in Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985); Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987); Jetstream Aero Servs., Inc. v. New Hanover County, 672 F. Supp. 879 (E.D.N.C. 1987); Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50, cert. granted, 337 N.C. 801, 449

S.E.2d 571 (1994); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

II. ACTIONS FOR PENALTY OR FORFEITURE.

Applicability of Subdivision (2). — Subdivision (2) of this section applies only to actions based on statutes which expressly provide for a penalty or forfeiture, the purpose of which is punitive. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Administrative Actions Pursuant to § 113A-64(a). — The one-year statute of limitations contained in subdivision (2) of this section does not apply to the assessment of a civil penalty by the Secretary of the Department of Environment, Health and Natural Resources pursuant to § 113A-64(a) because the assessment of the penalty is not an "action or proceeding" as those terms are used in this section. Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

Rent abatement remedy under the Residential Rental Agreements Act, § 42-38 et seq., does not constitute a "penalty or forfeiture" within the meaning of subdivision (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Protection of Worker's Compensation Claimants from Discharge or Demotion by Employers. — Former § 97-6.1, which related to protection of worker's compensation claimants from discharge or demotion, provided the time period for commencement of an action pursuant to this section. Whitt v. Roxboro Dyeing Co., 91 N.C. App. 636, 372 S.E.2d 731 (1988).

Actions Against Police Officers for False Arrest, False Imprisonment, and Assault and Battery. — To the extent that Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958), Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), and Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981), hold that the one-year statute of limitation for false imprisonment and assault and battery is the applicable statute when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties, those cases are expressly overruled. Fowler v. Valencourt, 435 S.E.2d 530 (N.C. 1993).

III. LIBEL, SLANDER, ASSAULT, BATTERY AND FALSE IMPRISONMENT.

Negligence Distinguished from Assault. — Where defendant fired a gun and bullet had ricocheted and struck plaintiff in the leg, trial court erred in holding that plaintiff's claim was barred by the one-year statute of limitations; while an assault claim was barred by the one-year statute of limitations, plaintiff had filed his claim well within the time prescribed for negligence actions. Vernon v. Barrow, 95 N.C. App. 642, 383 S.E.2d 441 (1989).

§ 1-54.1. Nine months.

Within nine months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Chapter 160A of the General Statutes or other applicable law. (1981, c. 705, s. 1; c. 891, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 1.)

Local Modification. — Union: 1987, c. 604, s. 2(2).

CASE NOTES

This section does not deny disaffected property owners adequate avenues of redress. Instead, the property owner is merely required to go through the statutorily mandated procedures for an amendment or variance. Whatever action was taken by the town's legislative body on the amendment would then be appealable. Sherrill v. Town of Wrightsville Beach, 81 N.C. App.

369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Challenge to Zoning Amendment Barred. — Challenge by plaintiffs to 1975 amendment prohibiting duplexes in R-1 districts as being violative of the purposes of zoning was barred by the statute of limitations of this section, even though the ordinance was already in effect when plaintiffs acquired their interest in the property. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Applied in Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986); Mahaffey v. Forsyth County, 99 N.C. App. 676, 394 S.E.2d 203 (1990).

Cited in Baucom's Nursery Co. v. Mecklenburg County, 89 N.C. App. 542, 366 S.E.2d 558 (1988); White v. Union County, 93 N.C. App. 148, 377 S.E.2d 93 (1989); Frizzelle v. Harnett County, 106 N.C. App. 234, 416 S.E.2d 421 (1992); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

Legal Periodicals. — For article, "The Statute of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

CASE NOTES

I. In General.
II. Actions to Which Section Applies.
III. Actions to Which Section Does Not Apply.

I. IN GENERAL.

Quoted in J. Lee Peeler & Co. v. Makepeace, 96 N.C. App. 118, 384 S.E.2d 283 (1989).

Cited in American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985).

II. ACTIONS TO WHICH SECTION APPLIES.

Resulting or Constructive Trust. —

Constructive trusts are governed by the ten-year statute of limitations in this section. Guy v. Guy, 104 N.C. App. 753, 411 S.E.2d 403 (1991).

An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Constructive trusts, as distinguished from express trusts, are governed by the 10-year statute of limitations in this section. Brisson v. Williams, 82 N.C. App. 53, 345 S.E.2d 432, cert. denied, 318 N.C. 691, 350 S.E.2d 857 (1986).

Foreclosure of Tax Lien. — An action to foreclose a tax lien is a civil action and this section bars civil actions commenced more than 10 years after the action accrues. Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

Constructive Fraud Based on Breach of Fiduciary Duty. — The 10-year statute of limitations under this section applies to constructive fraud claims based upon a breach of fiduciary duty. Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 83 (1990).

III. ACTIONS TO WHICH SECTION DOES NOT APPLY.

Absolute Divorce. — Balancing the reasons for having statutes of limitations against the State's public policies of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, this section, the general, residuary statute of limitations, should not be applied to actions for absolute divorce under § 50-6. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

CASE NOTES

- I. In General.
- V. Assignments.
  - A. In General.

I. IN GENERAL.

Cited in Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

V. ASSIGNMENTS.

A. In General.

Where language of assignment of a lease clearly established that lessor assigned only the right to rent payments, plaintiff retained all other rights under the lease, including the right to enforce lessee's tax obligation under the lease, and thus, lessor was a real party in interest in action against lessees who defaulted under lease. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Determination of Status of Insured on Assignment to Insurer — When Insurer's Payments Exceed Insured's Loss. — Where there is no genuine dispute that insurer's payments exceeded the insured's full loss, the trial court may summarily determine an objection to the insured's real party in interest status. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Extent of Loss Has Not Been Determined. — Trial court could not enter summary judgment against plaintiff based on § 1A-1, Rule 17(a) where plaintiff's status as a partial assignor and real party in interest could not be determined until the factual issue of the extent of plaintiff's entire loss was determined. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Insured Retains a Separable Interest. — If plaintiff insured assignor retained any separable legal interest in the subject matter of its claims, then both plaintiff and insurer assignee would be real parties in interest under § 1A-1, Rule 17(a) in the subject matter of the litigation. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

§ 1-69.1. Unincorporated associations and partnerships; suit by or against.

CASE NOTES

The requirements of this section are mandatory and failure to satisfy them is not exonerated by § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Strict construction of this section requires that before an unincorporated association may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by § 66-68 and then allegation of its specific location. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

This Section Controls over § 39-24. — Section 39-24 was enacted in 1939. The amendment to this section, which added the requirement of an allegation of § 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective October 1, 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of this section are mandatory and failure to satisfy them is not exonerated by § 39-24. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

This section controls in conflict with § 66-71. — In the face of any irreconcilable conflict between the provisions of this section and § 66-71, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. The same conclusion is reached when the subject matter of the two statutes is examined, since the more particular directives of this section would prevail over the general recordation provisions of § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Right to Hold Property Not Affected by This Section. — While it is true that this section requires an unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under § 39-25. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

But Right to Bring Suit Concerning Property Depends on Registration under This Section. — Under the wording of § 39-25, an unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with § 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Under this section, a union member may seek judicial relief from efforts by the union to deprive him of his legal rights. Poole v. Local 305 Nat'l Post Office Mail Handlers, 69 N.C. App. 675, 318 S.E.2d 105 (1984).

Failure of unincorporated association to comply with the directives of this section was fatal to its complaint. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Quoted in Clark v. Inn West, 89 N.C. App. 275, 365 S.E.2d 682 (1988).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

CASE NOTES

When cause of action arises directly from the foreign defendant's contacts with this State, the threshold for sufficiency of defendant's contacts with North Carolina is lowered. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Cited in Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

§ 1-75.2. Definitions.

In this Article the following words have the designated meanings:

(1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.

(2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this Article acts of the plaintiff are referred to, the reference includes the acts of his agent within the scope of the agent's authority.

(3) "Defendant" means the person named as defendant in a civil action, and where in this Article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

(4) Where jurisdiction of the person is drawn into question in respect to any claim asserted under Rule 14 of the Rules of Civil Procedure, the terms "Plaintiff" and "Defendant" as above defined shall include a third-party plaintiff and a third-party defendant respectively.

(5) "Solicitation" means a request or appeal of any kind, direct or indirect, by oral, written, visual, electronic, or other communication, whether or not the communication originates from outside the State. (1967, c. 954, s. 2; 1993, c. 338, s. 1.)

Editor's Note. —

Session Laws 1993, c. 338, s. 1, which added subdivision (5) was effective October 1, 1993, and was applicable to any actions filed on or after that date.

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.

Legal Periodicals. — For note, "Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory," see 69 N.C.L. Rev. 1271 (1991).

CASE NOTES

"Minimum Contacts." — The nonresident defendant must have "minimum contacts" with the state before any court of that state may render, consistent with the due process clause, a valid child custody order. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

The parent-child relationship is a status. In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990).

Personal Jurisdiction Required for Personal Judgment. — Pursuant to subsection (b) of this section, a court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4. Without personal "jurisdictional grounds," a trial court lacks the authority to render a child custody order against a nonresident defendant. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

§ 1-75.4. Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status. — In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
  a. Is a natural person present within this State; or
  b. Is a natural person domiciled within this State; or
  c. Is a domestic corporation; or
  d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes. — In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
  a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or

b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

(5) Local Services, Goods or Contracts. — In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property. — In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.

(7) Deficiency Judgment on Local Foreclosure or Resale. — In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation. — In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments. — In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers. — In any action which arises out of a contract of insurance as defined in G.S. 58-1-10 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative. — In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living.

(12) Marital Relationship. — In any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State. (1967, c. 954, s. 2; 1981, c. 815, s. 4; 1983, c. 231; 1995, c. 389, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to civil actions filed on or after that date, substituted "Rule 4(j), Rule 4(j1), or Rule 4(j3)" for "Rule 4(j) or Rule 4(j1)" in the introductory language.

Legal Periodicals. —

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

For note, "Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985): Should Domestic Disputes Require the Maximum or Minimum Contacts?" see 64 N.C.L. Rev. 825 (1986).

For note on the North Carolina Supreme Court's Rejection of the Minimum Contacts Analysis Under the "Transient Rule" of Jurisdiction, see 66 N.C.L. Rev. 1051 (1988).

For note, Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory," see 69 N.C.L. Rev. 1271 (1991).

For article, "Jurisdiction Over Those Who Breach Their Contracts: The Lessons of Burger King," see 72 N.C.L. Rev. 55 (1993).

CASE NOTES

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I. GENERAL CONSIDERATION.

Editor's Note. *— All of the case notes which previously appeared in the main volume and cumulative supplements under this section have been reprinted below, along with annotations taken since the publication of the 1990 Cumulative Supplement. The reprinting of these case notes was necessary to accommodate new case note analyses.*

This section is commonly referred to as the "long-arm" statute. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

And is based on the Wisconsin "long-arm" statute. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Purpose of Section. — Provisions of this section are a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds in United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zukerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied & appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982); Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

The long-arm statute is designed to confer jurisdiction over nonresident defendants to the fullest extent possible under the due process clause of the Fourteenth Amendment. Tart v. Prescott's Pharmacies, Inc., 118 N.C. App. 516, 456 S.E.2d 121 (1995).

This section is a procedural law which does not affect substantive rights. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Accordingly, it can properly be applied retroactively. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Liberal Construction. — There is a clear mandate that the North Carolina long-arm statute be given a liberal construction, making available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

Both the wording of this section and applicable case law accord liberal construction to this long-arm statute, thereby favoring finding personal jurisdiction. Thus, the prevailing law in North Carolina presumes the existence of in perscnam jurisdiction. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

This section should receive liberal construction, in favor of finding jurisdiction. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); Schofield v. Schofield, 78 N.C. 657, 338 S.E.2d 132 (1986).

Federal courts will give the statutory provisions a liberal construction in order to ensure that North Carolina courts maintain the full jurisdictional powers permissible under federal due process. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

Given the liberal construction of the

North Carolina long-arm statute, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

There is a clear mandate that the North Carolina Long-Arm Statute be given a liberal construction, thereby favoring a finding of personal jurisdiction. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Findings of Trial Court. — Absent request by a party, the trial court is not required to make findings as to which statutory grounds it utilized in finding personal jurisdiction, rather, it is presumed that the court, upon proper evidence, found facts sufficient to support its decision. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Judgment entered against a defendant over which court does not have in personam jurisdiction is void and subject to being set aside pursuant to § 1A-1, Rule 60(b)(4). Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

The resolution of the question of in personam jurisdiction involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant? Second, if so, does the exercise of this power by the North Carolina courts violate due process of law? Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Gro-Mar Pub. Relations, Inc., v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607 (1982); Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986); ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Before the court may exercise jurisdiction over a nonresident defendant, it must have statutory authorization and its exercise of such jurisdiction must comport with the requirements of due process. United Buying Group, Inc. v. Coleman, 37 N.C. App. 26, 245 S.E.2d 402 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 510, 251 S.E.2d 610 (1979).

The resolution of a question of in personam jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process. However, since the statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion comports with due process. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (1985).

To determine if foreign defendants may be subjected to in personam jurisdiction in this State, the court must apply a two-pronged test. First, it must be determined whether North Carolina jurisdictional statutes allow North Carolina courts to entertain the action. Second, it must be determined whether North Carolina courts can constitutionally exercise such jurisdiction consistent with due process of law. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985).

In order to determine whether North Carolina may properly exercise jurisdiction over the person of a foreign defendant, the court applies a two-part test: (1) Do the "long-arm" jurisdiction statutes, when liberally construed, permit the exercise of jurisdiction? (2) If so, does the exercise of jurisdiction unconstitutionally violate due process of law? B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Challenges to in personam jurisdiction present a two-part inquiry; first, whether the statutes of North Carolina permit the exercise of jurisdiction, and second, whether exercising in personam jurisdiction over defendant violates due process of law. Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

North Carolina has adopted a two-part test to determine whether a court may exercise in personam jurisdiction over a nonresident defendant. First, the court must determine whether the "long-arm" statute, confers jurisdiction over defendant. Second, the court must determine whether the exercise of personal jurisdiction violates defendant's right to due process. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Personal Service Suffices When Party Is Present in State. — The rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987); Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988).

Subdivision (1)a of this section permits our state courts, having subject matter jurisdiction, to exercise in personam jurisdiction over a person served with process in accordance with § 1A-1, Rule 4(j) or 4(j1), while present within the state. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Subdivision (2) of this section confers personal jurisdiction whenever any special jurisdiction statutes apply. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Section 66-192(c) is a "Special Jurisdictional Statute" as that term is used in this section. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

For case holding that subdivision (2) of this section and former § 55-145 did not violate federal due process as applied to a foreign corporation, see Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Personal Service Held to Establish Jurisdiction in Child Custody and Support Action. — The singular fact that defendant was served with process while present within this state was sufficient to establish in personam jurisdiction over him for purposes of a child custody and support action. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Alias and pluries summons served personally on a nonresident defendant while present in this state were held not to be issued on a different person and therefore related back to the original summons where the original summons had been properly served upon the Commissioner of Motor Vehicles pursuant to § 1-105. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

Applicability of Subdivision (12). — Subdivision (12) of this section, entitled "Marital Relationship," applies to an action under Chapter 50 only if the action for absolute divorce in the relationship was filed on or after October 1, 1981. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Jurisdiction over Alimony Modification. — Section 50-16.9 provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under this section, the North Carolina "long-arm" statute. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Allegation of Injury Is Sufficient. — The statute is satisfied if the plaintiff merely claims an injury occurred, not that the plaintiff has actually proven the injury. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

But the burden of plaintiff in establishing in personam jurisdiction requires more than conjecture on the court's part. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Cause of Action Need Not Be Related to Activities Giving Rise to Jurisdiction. — There is no requirement that the cause of action pursuant to which the jurisdictional claim is raised be related to the activities of the defendant which give rise to the in personam jurisdiction. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

The burden is on the plaintiffs to prove the existence of jurisdiction, but that burden can be met by a prima facie showing that jurisdiction is conferred by a statute such as this one. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976). See also, Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

The burden is on plaintiff to establish a prima facie showing that one of the statutory grounds enumerated in this section applies. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

There is no need for a tolling statute when a nonresident defendant is amenable to process. But this does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

The application of a tolling statute such as § 1-21 when defendant has at all times been subject to the service of process under subdivision (5) of the present section by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

Child Custody Order. — Pursuant to § 1-75.3(b), a court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in this section. Without personal "jurisdictional grounds," a trial court lacks the authority to render a child custody order against a nonresident defendant. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Contract Right Is "Asset or Thing of Value." — A contract right is a property right. A fortiori, it is an "asset or thing of value". Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Situs of Contract Right. — Where the holder of the contract right alleged is a North Carolina resident, the situs of the "asset or thing of value" is in this State. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Agency Relationship. — While a corporate entity is liable for any wrongful act or omission of an agent acting with proper authority, it does not follow an agent may be held liable under the jurisdiction of courts for acts or omissions allegedly committed by the corporation; jurisdiction may not be asserted over a corporate agent without some affirmative act committed in his individual official capacity. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Fact that defendant was acting within the scope and course of employer-employee and agency relationship with a North Carolina company at the time of collision, did not mean that North Carolina courts could exercise personal jurisdiction over him. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Applied in Moore v. Wilson, 62 N.C. App. 746, 303 S.E.2d 564 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); McMahan v. McMahan, 68 N.C. App. 777, 315 S.E.2d 536 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984); Jellen v. Ernest Smith Ins. Agency, Inc., 72 N.C. App. 51, 323 S.E.2d 401 (1984); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); Thompson v. National Grange Mut. Ins. Co., 620 F. Supp. 644 (W.D.N.C. 1985); Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989); Med-Therapy Rehabilitation Servs., Inc. v. Diversicare Corp. of Am., 768 F. Supp. 513 (W.D.N.C. 1991); Capstar Corp. v. Pristine Indus., Inc., 768 F. Supp. 518 (W.D.N.C. 1991); Cox v. Hozelock, Ltd., 105 N.C. App. 52, 411 S.E.2d 640 (1992); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Climatological Consulting Corp. v. Trattner, 105 N.C. App. 669, 414 S.E.2d 382 (1992); Glaxo, Inc. v. Genpharm Pharmaceuticals, Inc., 796 F. Supp. 872 (E.D.N.C. 1992); Tutterrow v. Leach, 107 N.C. App. 703, 421 S.E.2d 816 (1992).

Quoted in Richmar Dev., Inc. v. Midland Doherty Servs., Ltd., 717 F. Supp. 1107 (W.D.N.C. 1989).

Stated in Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652 (1987).

Cited in Harrelson Rubber Co. v. Layne, 69 N.C. App. 577, 317 S.E.2d 737 (1984); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Glynn v. Stoneville Furn. Co., 85 N.C. App. 166, 354 S.E.2d 552 (1987); North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 685 F. Supp. 114 (E.D.N.C. 1988); Allied Mechanical Contractors v. Industrial Relations Council for Plumbing & Pipe Fitting Indus., 685 F. Supp. 552 (W.D.N.C. 1988); Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75 (1989); Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989); Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989); Copley Triangle Assocs. v. Apparel Am., Inc., 96 N.C. App. 263, 385 S.E.2d 201 (1989); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128 (W.D.N.C. 1991); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

II. DUE PROCESS CONSIDERATIONS.

A. In General.

This section should be liberally construed in favor of finding personal jurisdiction, subject to due process limitations. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Analysis Under this Section and Federal Due Process Clause. — Analysis under the long-arm statute and the federal due process clause is one and the same since the statute extends to the outer bound of due process. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

North Carolina's long-arm statute has been construed as reaching as far as the due process limits of the United States Constitution will allow it. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

This section is to be construed liberally in favor of finding jurisdiction, and makes available to North Carolina courts the full jurisdictional powers permissible under federal due process. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

Several North Carolina courts have deemphasized the determination of whether minimum contacts exist. The North Carolina long-arm statute extends to the outer bounds of due process, making analysis under the statute and the due process clause one and the same. Thus, given the liberal construction of the North Carolina long-arm statute, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

But Courts Cannot Expand Jurisdiction Beyond Due Process Limitations. — While the provisions of the "long-arm" statute are to be liberally construed in favor of finding personal jurisdiction, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

Regardless of the statutory ground, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. There must be a showing that the defendant had sufficient minimum contacts with North Carolina. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Legislature Intended Full Jurisdictional Powers Permissible Under Federal Due Process. — From the enactment of subdivision (1)d of this section, it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Dillon v. Numismatic

Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Subdivision (1)d of this section represents a legislative codification permitting the assertion of in personam jurisdiction over nonresident defendants to the full extent allowed by due process. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

This section was designed to extend jurisdiction over nonresident defendants to the full extent permitted by the due process clause of U.S. Const., Amend. XIV. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Subdivision (1)d of this section grants the courts of North Carolina the opportunity to exercise jurisdiction over a foreign corporation to the extent allowed by due process. H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The legislature, by way of subdivision (8) of this section and former § 55-33, has expressed a substantial interest in bringing nonresident directors of corporations before the North Carolina courts, and has given to the courts the fullest jurisdiction allowable under the Constitution. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

This statute is a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. Thus it is possible that a defendant's contact with this forum may be sufficient to satisfy the requirements of this section, but yet be insufficient to satisfy the requirements of due process. Lane v. WSM, Inc., 575 F. Supp. 1246 (W.D.N.C. 1983).

While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as to action in personam, it is also clear that the General Assembly in enacting § 1-75.8(3) intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

By enacting subdivision (4) of this section, the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

The provisions of this section authorize the exercise of in personam jurisdiction over nonresident defendants to the fullest extent, tempered only by the due process clause of U.S. Const., Amend. XIV. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

The courts of this state construe this section as conveying personal jurisdiction upon the courts to the full extent allowed by the due process clause of the United States Constitution. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Due process, and not language of statute, is ultimate test of "long-arm" jurisdiction over a nonresident. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

The crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the "long-arm" statute is due process. Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion thereof comports with due process. Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

Whether the exercise of jurisdiction pursuant to the long-arm statute comports with due process is the critical inquiry. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Once plaintiff has met require-

ments of this section, he must also satisfy constitutional requirement of due process by showing that defendant has sufficient minimum contacts with North Carolina to confer jurisdiction. Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985).

In addition to meeting the statutory requirements, in order for a court to exercise its jurisdiction the defendant must be found to have certain minimum contacts with the State in compliance with due process requirements. Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

The due process requirement of "minimum contacts" applies with equal force to actions quasi in rem as it does to actions in personam. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

B. Determining Minimum Contacts.

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zukerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied and appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, 312 N.C. 749, 325 S.E.2d 223 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

The North Carolina courts carefully follow the "minimum contacts" standards set in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Unless a nonresident defendant has had "minimum contacts" with the forum state, that state may not exercise jurisdiction over him. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The North Carolina Supreme Court has simplified the task of determining whether there is a long-arm statute authorizing the assertion of personal jurisdiction by holding that subdivision (1)d of this section applies to any defendant who meets the minimal contact requirements of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Western Steer — Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

Due process requires only that in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

The exercise of statutory jurisdiction must satisfy elementary constitutional due process, as embodied in the familiar "minimum contacts" test. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Although the minimum contacts analysis has been consistently applied to cases in which nonresident defendants were served with process outside this State, such minimum contacts analysis is not necessary when the defendant is personally served while present within this State. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987).

The existence of minimum contacts is a question of fact. Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981).

Determination of whether minimum contacts are present cannot be effected by using a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The minimum contacts test is not mechanical, but requires consideration of the facts of each case. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

But Depends on the Particular Facts. — Whether the type of defendant's activity conducted within the State is adequate to satisfy the requirements of due process depends upon the facts of the particular case. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The presence of minimum contacts is not to be determined by automatic application of per se rules; rather, the existence of minimum contacts depends upon the particular facts of each case. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The minimum contacts test is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

And Varies with the Quality and Nature of Defendant's Activities. — Application of the minimum contracts theory varies with the quality and nature of a particular defendant's activities. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

Fairness to Both Plaintiff and Defendant Must Be Considered. — In determining whether subjection of a corporation to in personam jurisdiction in a foreign forum offends traditional notions of fair play and substantial justice, the interests of and fairness to both the plaintiff and the defendant must be considered and weighed. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

Where the conduct giving rise to the cause of action against nonresident defendant occurred in North Carolina, material evidence and crucial witnesses are more likely to be located within this state. Further, the inconvenience to a corporate defendant in being forced to defend suit away from home is not overwhelming in today's mobile society. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

What contacts with the forum state constitute minimum contacts for jurisdictional purposes is ultimately a fairness determination: The defendant's conduct and connection with the forum state must be such that it reasonably anticipates being haled into court there. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (1985).

Factors in Determining Minimum Contacts and Fairness. — There are a number of factors, some essential and others only having some weight, to be considered in determining whether the tests of "minimum contacts" and "fair play" have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) There must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) The legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

The criteria for analyzing whether minimum contacts are present include: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action with those contacts, the interest of the forum state and convenience. Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp.

424 (M.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Other factors to be considered in determining whether minimum contacts exist are: (1) Any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (2) An estimate of the inconvenience to the defendant in being forced to defend a suit away from his home; (3) The location of crucial witnesses and material evidence; and (4) The existence of a contact which has a substantial connection with the forum state. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

The United States Supreme Court has recognized the types of activities which can constitute sufficient contacts that would allow a state to exercise jurisdiction. First, a defendant may avail itself of the privileges and benefits of a state's laws; second, it may solicit business there either through sales persons or through advertising reasonably calculated to reach a particular state; and finally, a defendant may indirectly, through others, serve or seek to serve the state's market. The receipt of financial benefits from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that state. These considerations provide the paradigm through which any decision concerning a state's exercise of long-arm jurisdiction must be made. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

The criteria for determining whether sufficient minimum contacts exist include: the quantity, quality and nature of the contacts, the source and connection of the cause of action with the contacts and with the forum state; the interest of the forum state with respect to the activities and contacts of the defendant; an estimate of the inconvenience to the defendant in being forced to defend suit away from home; and the location of crucial witnesses and material evidence. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The primary factors utilized in analyzing whether minimum contacts are present are the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts and two others, interest of the forum state and convenience. Western Steer — Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight in determining whether minimum contacts exists. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

The criteria for determining whether minimum contacts exists include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Certain primary and secondary factors are used in determining minimum contacts questions. These include three primary factors: (1) Quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts; and two secondary factors, interests of the forum state and convenience to the parties. No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Minimum contacts do not arise ipso facto from actions of a defendant having an effect in the forum state. There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, such that he or she should reasonably anticipate being haled into court there.

Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

Mere fortuitous contact with the forum state in the course of business dealings will not suffice to meet the minimum contacts test. There must be some act or acts by which the defendant has purposefully availed itself of the privilege of doing business there. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Lack of action by defendant in the jurisdiction is not fatal to the exercise of long-arm jurisdiction. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

Defendant Must Have Invoked Benefits and Protections of Law of Forum. — While application of the minimum contacts standard will vary with the quality and nature of defendant's activity, it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981).

In cases of contract disputes, the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state. Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

With regard to determining the existence of minimum contacts, it is essential that defendant purposely act to avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; additionally, defendant's contacts with the forum state must be such that he or she should reasonably anticipate being haled into court there. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Where foreign corporation obviously uses, benefits from or can easily use the laws of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

When the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, then minimum contacts are more likely to be found. Watson v. Graf Bae Farm, Inc., 99 N.C. App. 210, 392 S.E.2d 651 (1990).

Single Contract May Be Sufficient Minimal Contact. — A single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base in personam jurisdiction, with respect to the parties so contracting. First-Citizens' Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds, United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract is sufficient under subdivision (5)c of this section to satisfy the minimal contacts requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

If a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract may constitutionally support jurisdiction over a nonresident corporate defendant, especially when the defendant also does substantial other business in the forum state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

A single contract made in North Carolina can be sufficient to subject a nonresident defendant to suit here. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

But a Single Noncontractual Contact Is Not Sufficient. — If there is only one contact with North Carolina and such contact does not involve a contract to be performed here, there is no jurisdiction. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

If a foreign company's activity is regular, or systematic, or continuous, minimum contacts exist. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

If a foreign corporation has never had any interest in North Carolina or contacts here, even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Principal May Be Subjected to "Long-Arm" Jurisdiction for Acts of Agent. — A principal may be subjected to "long-arm" jurisdiction on account of the acts of his agent within the course and scope of his authority, since this is reasonable and just according to our traditional conception of fair play and substantial justice. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

A nonresident owner-principal is liable for his agent's acts, even though the principal has never entered this State. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Jurisdiction over Principal Shareholder Conducting Business as Agent for Corporation. — Where defendant is a principal shareholder of a corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979).

Test for Nonresidents Who Allegedly Abused High Governmental Powers. — For those who have allegedly abused high governmental powers, the test is whether they reasonably could have anticipated that their activity would have consequences in the forum state. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

As to due process requirements for jurisdiction over nonresident directors of domestic corporations in shareholders' derivative actions, see Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Breach of Contract for Sale of Real Estate. — Where the record showed that defendant entered into a contract to purchase real property situated in North Carolina, formed a corporation in this State to receive the title, and thus invoked the benefits and protection of its laws, and the suit in question arose out of an alleged breach of that contract, assumption of in personam jurisdiction over defendant by the courts of this State did not offend traditional notions of fair play and substantial justice within the contemplation of the due process clause of U.S. Const., Amend. XIV, and defendant's contacts with the State were sufficient to satisfy due process requirements. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Promise to Pay Debt of Another. — Where nonresident defendant promised to pay the debt of another, which debt was owed to North Carolina creditors, such promise was a contract to be performed in North Carolina and was sufficient minimal contact upon which this State could assert personal jurisdiction over the defendant. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

A promise to pay the debt of another which is owed to a North Carolina creditor is a contract to be performed in North Carolina. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Guaranty of Corporate Obligations. — While the mere guaranty by a nonresident of a debt owed to a North Carolina corporation does not per se constitute a sufficient minimal contact upon which this State may assert personal jurisdiction, the circumstances surrounding defendant's guaranty of the obligations of the out-of-state corporation of which he was president, incident to a contract to sell and lease back a houseboat, were such that his contacts with North Carolina justified the assertion of jurisdiction. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Defendant purposely entered into a contract with plaintiff promising to ship its product to North Carolina through a carrier, where plaintiff's president called defendant from North Carolina to make the offer, and defendant mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina. These acts manifested a willingness by defendant to conduct business in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

The sale and use of out-of-state defendant's products in North Carolina was sufficient to constitute the minimum contacts required by the due process clause, so as to permit the exercise of in personam jurisdiction over defendant. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

The flow of a large amount of goods from North Carolina to a nonresident defendant and the anticipated flow of money to North Carolina were more than sufficient to establish the minimum contacts requirements of the long-arm statute. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

Action for Alimony Based on Abandonment. — The trial court obtained personal jurisdiction over the nonresident defendant in an action for alimony based on abandonment and for child custody and support where defendant was served with process by registered mail, since an action for alimony on the ground of abandonment was a claim of "injury to person or property" under the long-arm statute, and defendant's acts of living with and abandoning plaintiff-wife in this State met the "minimum contacts" test. Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980), decided prior to enactment of subdivision (12).

Support Payment Arrearages. — Where the parties entered into a separation agreement in North Carolina while both parties were citizens and residents of this State, the agreement providing, among other things, that the defendant would pay $350.00 per month to the plaintiff for support, the parties were divorced in North Carolina, and some time after the separation agreement was entered into, defendant moved to Florida and continued to reside there since that date, the court had in personam jurisdiction over the defendant under subdivision (5)c of this section in an action for arrearages. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978), decided prior to enactment of subdivision (12).

Production of Church Directories. — The courts of this State had in personam jurisdiction over defendant, an Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of a certain North Carolina corporation, which corporation had contracted with plaintiff, another North Carolina corporation, engaged in the printing business, for the production of certain church directories, and defendant agreed that it would pay plaintiff for its work in printing such directories; such conduct fell within that covered by subdivision (5)a of this section. Other conduct by defendant, including the writing of five memoranda on defendant's stationery requesting that plaintiff ship books to churches in five different states, also gave the courts of this State in personam jurisdiction over defendant. Moreover, defendant had sufficient minimum contacts with North Carolina so that the exercise of in personam jurisdiction would not violate due process of law. Delprinting Corp. v. C.P.D. Corp., 49 N.C. App. 449, 271 S.E.2d 548 (1980).

Franchise Contract. — Where defendant agreed in a franchise contract to pay plaintiff a 20-cent royalty and service fee on every pound of materials essential to a manufacturing process, in exchange for plaintiff's development of the process and for technical services plaintiff would render to defendant, jurisdiction over defendant was conferred under subdivisions (5)a and b of this section in an action arising from defendant's failure to pay the promised royalties. Harrelson Rubber Co. v. Dixie Tire & Fuels, Inc., 62 N.C. App. 450, 302 S.E.2d 919 (1983).

In action for alleged breach of franchise agreement which specifically stated that it was made and executed in North Carolina and was to be governed by North Carolina law, where defendant franchisee had not only agreed to pay for services to be performed in North Carolina by franchisor under an ongoing ten-year contract, but such services in fact were provided, and where defendant personally appeared in North Carolina to take advantage of training provided pursuant to the franchise agreement, personal jurisdiction existed over out-of-state defendant, who had sufficient minimum contacts with North Carolina to meet the mandates of due process; fact that plaintiff was the assignee of the franchisor and was a Pennsylvania corporation with no office in North Carolina would not cause North Carolina to lose its power to entertain litigation over the franchise agreement. Wiener King Sys. v. Brooks, 628 F. Supp. 843 (W.D.N.C. 1986).

Manufacturing Contract. — In an action to recover a deposit paid pursuant to a manufacturing contract, jurisdiction existed over defendant, a foreign corporation, where plaintiff, a domestic corporation, had contracted with it to manufacture products using components supplied by plaintiff, and it was contemplated that some of the products would be sold in North Carolina. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

Nonresident defendant, a clothing distributor, who made an offer to North Carolina manufacturer for specially manufactured shirts, the contract to be substantially performed in this State, had sufficient minimum contacts with this State to justify the exercise of personal jurisdiction in an action on the contract brought by plaintiff manufacturer. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

Fraudulent Transactions. — Where although the quality of two of the defendants' contacts was insignificant, the nature and quality of their contacts and their connection with the cause of action were substantial, the interest of this forum in the litigation of lawsuits for fraudulent transactions of million dollar proportions which occurred here was substantial, and most importantly, the defendants invoked the benefits and protections of the law of this forum by their actions, both the statutory and due process requirements for asserting personal jurisdiction over defendants were satisfied. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Sale of Securities. — Exercise of personal jurisdiction over nonresident directors of a North Carolina corporation on a complaint relating to sales of securities by the corporation was authorized by statute and would not violate the due process clause of the United States Constitution. Pasquinelli v. Wilson, 89 N.C. App. 341, 365 S.E.2d 702 (1988).

Where defendant salesman knowingly submitted allegedly fraudulent documents to his employer, located in this state, over a period of two years, causing substantial damage to the corporation, and it was clear that the alleged tort would have its damaging effect in North Carolina, simply because defendant was able to cause the injury without physically coming to this state did not defeat the jurisdiction of this state in a tort action brought by his employer. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In a civil action in which plaintiff agricultural chemical company, with its home office in Greensboro, sought damages allegedly incurred as a result of tortious conduct by defendant salesman, its employee, who lived in Indiana and worked in sales territories in Indiana and Ohio, between 1980 and 1982, in submitting falsified customer complaints and refund requests, then converting the credits or replacement products to his own use, the court had jurisdiction under subdivision (5) of this section. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In breach of warranty action by buyer corporation domiciled in North Carolina against seller out-of-state corporation for clothing purchased in Denver, Colorado, shipped F.O.B. Denver, received by the buyer's subsidiary in North Carolina and, without being opened, shipped to Germany for resale, the court had in personam jurisdiction, both under state statute and the federal Constitution. W. Conway Owings & Assocs. v. Karman, Inc., 75 N.C. App. 559, 331 S.E.2d 279 (1985).

Formation of Partnership. — Although defendant's contacts with state were few in number, the nature and quality of contacts, his soliciting of partners here, the formation of the partnership here, defendant's receipt of monies sent to him from North Wilkesboro, and the partnership's taking out a loan for which defendant signed a guaranty agreement with a North Carolina bank, were such that due process was not offended by this state's exercising jurisdiction over him. Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

Partnership Contract. — The parties' execution of and conduct of business pursuant to a North Carolina partnership contract was sufficient for in personam jurisdiction. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Out-of-state defendant, as partner in an accounting firm with offices in North Carolina, had a quantity of other "systematic and continuous" contacts with North Carolina sufficient to show general jurisdiction, where defendant returned to North Carolina for yearly corporate meetings, participated in partnership management decisions as managing partner of Mobile, Alabama office, and consulted by telephone and corresponded with plaintiff in North Carolina concerning business matters on a continuous and prolonged basis; moreover, each of these circumstances also illustrated that defendant sought, obtained and exercised the privilege of conducting activities in this State. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Where defendant received benefits from a partnership contract and could have enforced the contract against plaintiff in North Carolina courts, personal jurisdiction was proper. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Participation in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within this State is conduct which invokes the protection of the law of this State to such an extent that traditional notions of fair play and substantial justice are not offended by requiring the defendants to defend in this State an action growing out of the partnership. Park Ave. Partners v. Johnson, 80 N.C. App. 537, 342 S.E.2d 570, cert. denied, 317 N.C. 706, 347 S.E.2d 438 (1986).

West Virginia corporation whose sole business function was to process tire orders and forward them to B.F. Goodrich Co. in Ohio, and which paid a commission to the person who obtained the orders, had adequate minimum contacts with North Carolina to be sued in this state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Attribution of Subsidiary's Contacts to Parent Corporation. — For case holding that the business relationship between an English corporation and its Tennessee subsidiary was sufficiently analogous to a manufacturer-distributor relationship to attribute the subsidiary's contacts with this State to the parent corporation, see Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977).

Presence in State by Subsidiary. — Foreign insurance company could not hold itself out to its shareholders and the public as doing business in North Carolina and, at the same time, selectively avoid process from North Carolina courts by arguing that its only presence in this State was by its subsidiary, where the subsidiary was formed for the very purpose of carrying on the business of the parent company, which had formerly been carried on by the parent in the Bahamas, and where the parent's principal officers lived and transacted business in Raleigh and nearly all of the parent's business activities were carried on in this State, albeit in the name of its subsidiary under a "consulting" agreement. FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989).

In an action for fraud concerning the sale of a defective aircraft, where, among other things, defendant, a New Jersey resident, advertised the sale of the airplane in a trade magazine which was mailed to offices of plaintiff in this state, defendant initiated and placed numerous telephone calls to plaintiff, and mailed brochures, information, specifications, and photographs of the aircraft to plaintiff in this state, plaintiff forwarded funds from a North Carolina bank in response to these solicitations and at defendant's request, and witnesses to the condition of and repairs to the aircraft and expenses incurred subsequent to defendant's delivery of the aircraft to plaintiff were all residents of North Carolina, defendant had sufficient minimum contacts with this state and maintenance of plaintiff's action did not offend traditional notions of fair play and substantial jurisdiction; therefore, the trial court had proper in personam jurisdiction over defendant. New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 381 S.E.2d 156, appeal of right allowed pursuant to N.C.R.A.P. 16(b) and petition denied as to additional issues, 325 N.C. 546, 385 S.E.2d 499 (1989), aff'd, 326 N.C. 480, 390 S.E.2d 137 (1990).

Where defendant Georgia corporation engaged in several North Carolina business arrangements, and on three occasions entered this State and conducted relations with North Carolina businesses, defendant had sufficient minimum contacts with this State to justify the exercise of personal jurisdiction over it without violating the due process clause. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Multiple contacts by defendant Michigan corporation with North Carolina, including the physical presence of defendant's corporate officers in the State, as well as the use of the State's banking system for defendant's economic transactions, were sufficient to establish a "substantial connection" with North Carolina such that in personam jurisdiction could be exercised over defendant. Lexington Aerolina, Inc. v. Murray Aviation, Inc., 100 N.C. App. 254, 394 S.E.2d 838 (1990).

Acts by Officers of Foreign Corporation. — An allegation that officers of a Massachusetts corporation impliedly or expressly knew of false and fraudulent representations made by corporation in North Carolina was insufficient to confer jurisdiction over those officers under this section where those officers filed affidavits denying the allegation, had never travelled to North Carolina, and had no involvement in the matters complained of. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Out-of-State Injury to Trucker Employed by Out-of-State Company. — Industrial Commission did not have jurisdiction over a workers' compensation claim arising from a tractor-trailer driver's out-of-state injury, where, although the trucking company which employed him had business contacts with North Carolina sufficiently substantial to meet minimum due process requirements, the company's principal place of business was in Indiana. Thomas v. Overland Express, Inc., 101 N.C. App. 90, 398 S.E.2d 921 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 522 (1991).

Out-of-state defendant's affirmative efforts to obtain and renew a CPA license from North Carolina and using the license to provide accounting services for North Carolina residents showed defendant's purposeful acts in obtaining and using the privilege of doing business in this State. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Technical Support and Purchases from North Carolina Company. — Where defendants contacted plaintiff in North Carolina for technical support via an 800 number, plaintiff modified software and computer programs for defendants' computer in North Carolina, and plaintiff shipped computers, forms, and computer supplies from its office in North Carolina to defendants, this section provided the statutory basis for the exercise of personal jurisdiction over the nonresident defendants. Dataflow Cos. v. Hutto, 114 N.C. App. 209, 441 S.E.2d 580 (1994).

Where the defendant admitted the existence of jurisdiction in her answer, that fact was conclusively established and could not be disputed. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Where action arose out of the defendant's failure to honor promise to deliver cash due under contract to a North Carolina business, subdivision (5)c of this section applied and North Carolina's "long-arm statute" allowed jurisdiction. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Contacts Held Sufficient. — Defendant purposely directed its contacts with North Carolina by entering into contract with lessee and availing itself of the privilege of doing business in this State. Because plaintiff's claim arose directly from defendant's contacts with North Carolina, it would not offend traditional notions of fair play and substantial justice to have defendant haled into court in North Carolina. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Canadian corporation had more than sufficient contacts with North Carolina to satisfy due process considerations, where its officers made repeated phone calls and wrote several letters to a North Carolina corporation regarding leasing services that were to be performed in North Carolina, and the two corporations entered into a guaranty agreement governed by North Carolina law. Barclays Leasing, Inc. v. National Bus. Sys., 750 F. Supp. 184 (W.D.N.C. 1990).

Contacts with out-of-state seller of trailer involved in collision with plaintiff with North Carolina were adequate to meet the due process requirements associated with the exercise of personal jurisdiction. In addition, North Carolina had an interest in adjudicating the dispute as plaintiff was a resident of the State, his alleged injuries occurred in the State, and North Carolina law governed his claims as well as the cross-claims asserted by his widow. Murphy v.

Glafenhein, 110 N.C. App. 830, 431 S.E.2d 241, appeal dismissed, 335 N.C. 176, 436 S.E.2d 382 (1993).

For additional cases holding the evidence sufficient to establish minimum contacts, see Williams v. Institute for Computational Studies, 85 N.C. App. 421, 355 S.E.2d 177 (1987); Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

IV. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

Purchase of Insurance. — Responding to solicitation by a North Carolina insurance company by purchasing coverage for property located in another jurisdiction was not an act by which insured "purposefully availed" himself of the privilege of conducting activities within North Carolina. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

Where insured's only contact with the state of North Carolina was the mailing of premium payments to insurer's Charlotte office pursuant to insurance contracts, this, standing alone, was insufficient contact to justify requiring him to litigate here. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

The mere act of entering into a contract with a resident will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendant's performance are to take place outside the forum. Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

The courts of North Carolina did not have any statutory basis for personal jurisdiction over a nonresident defendant who made occasional purchases and related trips in this State, but did not engage in regular and systematic business in North Carolina, and who hired the resident plaintiff to sell some equipment, without any expectation of performance in North Carolina, and without any actual performance being apparently done in North Carolina. Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985).

Where the plaintiff, a corporation authorized to do business in North Carolina, initiated contact with and solicited the services of the defendant Maryland corporation, contract negotiations occurred outside of this state, the services to be performed under the contract were to occur outside North Carolina, and the defendant's only contact with North Carolina appeared to have been through phone calls, the shipment of office chairs to North Carolina and receipt of one commission check were insufficient to support the exercise of in personam jurisdiction. Curvcraft, Inc. v. J.C.F. & Assocs., 84 N.C. App. 450, 352 S.E.2d 848 (1987).

The mere ownership of property in the forum state is insufficient to establish the "minimum contacts" necessary to satisfy the requirements of due process. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Contract to Perform Consulting Services. — Where a contract made in North Carolina required that defendant, a nonresident, perform certain consulting services for a company having its home office and two manufacturing plants in North Carolina, and in fact defendant did perform such services on two occasions via long distance telephone conversations placed outside the State, and the contract was silent as to whether services were to be performed in North Carolina, the court did not need to determine whether the contract was in accord with subdivision (5)a of this section, since even if such paragraph was satisfied, due process was not. Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980).

Signing of Guaranty or Endorsement. — Mere signing by a nonresident of a guaranty or endorsement of a debt owed to a North Carolina creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979), rejecting the rule adopted in First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

Placing of Advertisements in National Magazines. — Even assuming that the statutory requirement of "solicitation within the State" is satisfied, the placing of advertisements in national magazines, without more, is not sufficient contact to fall within "traditional notions of fair play and substantial justice" as a basis for the exercise of personal jurisdiction. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Placement of advertisements in a national publication cannot by itself support jurisdiction. Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990).

Where the only contacts between defendant and this state were an advertisement placed in a national publication, telephone calls between plaintiff and defendant, and cashier's check sent by plaintiff to defendant, and where defendant never came to North Carolina, received the check in Pennsylvania, and delivery of the cars was to take place in Pennsylvania, there were not sufficient minimum contacts to support jurisdiction. Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990).

Nonresident Holder of Part Interest in Note Secured by Deed of Trust on Property Within State. — This section does not give a North Carolina district court jurisdiction in personam over the out-of-state holder of a part interest in a note secured by a deed of trust on property in North Carolina, for to do so would violate the rule expressed by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977); Whitener v. Whitener, 56 N.C. App. 599, 289 S.E.2d 887, cert. denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Single executed contract to repair single piece of personal property for non-resident corporation with no other contracts does not constitutionally allow exercise of personal jurisdiction. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Advertising Availability for Employment in Trade Magazine. — Contract for employment in Texas as to which plaintiff initiated the negotiations by advertising his availability for employment in a trade magazine could not form the basis of general jurisdiction over defendant employer. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Presence in this State of an independent showroom displaying defendant's products was not sufficient contact with the forum to give the federal district court general jurisdiction over defendant. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Corporation's Alter Ego Conducting Business in State. — Where defendant manufactured and sold its products exclusively in Michigan to its only customer, another Michigan corporation, and plaintiff presented no evidence defendant initiated a business relationship with any North Carolina resident, but plaintiff alleged that defendant had been "doing business" in North Carolina through its alter ego, the mere fact that the alter ego did business in North Carolina was an insufficient basis for invoking personal jurisdiction over defendant, which otherwise had no contacts with the forum state. DP Envtl. Servs., Inc. v. Bertlesen, 834 F. Supp. 162 (M.D.N.C. 1993).

Manufacture of Textiles in State. — While it appeared that defendant, a California corporation, was subject to personal jurisdiction under subdivision (5)b of this section, since plaintiff performed services for defendant within this state by manufacturing certain textiles, and the record indicated that defendant was well aware that the textiles ordered were to be manufactured by plaintiff in this state, the exercise of jurisdiction over defendant also had to comport with due process requirements, and there were insufficient minimum contacts with this state to satisfy the requirements of due process. Taurus Textiles, Inc. v. John M. Fulmer Co., 91 N.C. App. 553, 372 S.E.2d 735 (1988).

Manufacturer's Contacts Held Not Sufficiently Continuous and Systematic. — Exercise of in personam jurisdiction over a boiler manufacturer, a New York corporation which was not authorized to do business in North Carolina, which in 1984 sold approximately $520,000 worth of boilers to North Carolina customers, accounting for about one-half percent of its total boiler sales for the year, which sales were solicited by independent contractors who acted as sales representatives for defendant and other manufacturers, which had placed advertisements in several national magazines which reached North Carolina, and which had a wholly owned subsidiary, which was engaged in the business of greenhouse construction, and which was authorized to do business in North Carolina, was not warranted, as defendant's contacts with North Carolina were not so "continuous and systematic" as to warrant the exercise of in personam jurisdiction. Ash v. Burnham Corp., 80 N.C. App. 459, 343 S.E.2d 2, aff'd, 318 N.C. 504, 349 S.E.2d 579 (1986).

Nonresident Plaintiff and Nonresident Corporate Defendant. — Evidence did not support a finding of minimum contacts or purposeful availment. Non-resident plaintiff's claim alleged a single incident of negligence by defendant's employees, which incident occurred in Nebraska. Defendant dairy company was a nonresident corporation which neither owned nor rented any property in North Carolina, did not maintain any employees, offices, telephone listings, or mailing addresses in the state; the company never solicited or sold any of its dairy products directly in North Carolina. Furthermore, defendant's only connection with North Carolina was the sporadic resale of its product by an independent third party. Considine v. West Point Dairy Prods., 111 N.C. App. 427, 432 S.E.2d 412 (1993).

Check Cashed by Plaintiff. — Facts that (1) a check drawn on a joint investment account of the defendant, a Florida resident, payable through a Pennsylvania bank, was cashed by plaintiff bank in North Carolina and then shredded by plaintiff, and that (2) defendant refused to honor plaintiff's demand that the check be replaced did not meet the minimum contacts requirement for personal jurisdiction. First Charter Nat'l Bank v. Taylor, 80 N.C. App. 315, 341 S.E.2d 747 (1986).

The mere fact that a marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant. Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990).

Equitable Distribution. — Assuming arguendo that the North Carolina "long-arm" statutes gave the North Carolina courts jurisdiction over defendant for purposes of equitable distribution, application of those statutes would violate the due process clause of U.S. Const., Amend. XIV where defendant had not lived in this State for any part of the marriage, and where, although certain property of the parties was located in this State, there was no indication of any action by defendant purposely directed towards this State. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Alimony Reduction. — Money payments are "things of value" within the meaning of subdivision (5)d of this section; thus in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Child Support Suit. — Assuming arguendo that this section would give North Carolina courts in personam jurisdiction over defendant father in suit seeking an increase in child support, application of this section to him would violate the due process clause of U.S. Const., Amend. XIV, where defendant's only contacts with North Carolina were that his daughter had lived here for nine years, during which time he had sent child support payments to plaintiff at her North Carolina residence, that he had come to North Carolina on several occasions to visit his daughter, and that the child had attended North Carolina public schools and had otherwise enjoyed the benefits and protections of the laws of this State. Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985).

For additional cases holding the evidence insufficient to establish minimum contacts, see Dillard v. USAir, Inc., 114 N.C. App. 791, 443 S.E.2d 80 (1994).

V. LOCAL PRESENCE OR STATUS.

The words "domicile" and "inhabitant" mean substantially the same thing. One is an inhabitant of or domiciled in a given place if he resides there actually and permanently. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Asset Purchase Agreement Created Substantial Connection. — Where buyer of business had an asset purchase agreement with two owners of business, although owners had never been physically in the state, agreement created a substantial connection to North Carolina which supported court's exercise of personal jurisdiction over two owners; the owners were parties to the agreement as individual shareholders and as officers, the agreement provided for closing in Charlotte, North Carolina, and was in fact closed in Charlotte, the agreement was largely performed in Charlotte, owners were aware or should have been aware that a large part of the bargaining occurred in North Carolina, and the parties assumed continuing responsibilities toward one another. Hanes Cos. v. Ronson, 712 F. Supp. 1223 (M.D.N.C. 1988).

Volume and Temporal Requirements Inferred. — Where plaintiffs alleged the misrepresentations which induced their own purchase of a lifetime partnership were pursuant to a scheme or artifice to defraud which over time resulted in the fraudulent sale of over 55,000 such partnerships through defendants' solicitation activities originating in part in the State of North Carolina, it was readily inferable, under the tolerant prima facie test, that the activities required to sell such a volume of partnerships were sufficiently substantial in volume and long in duration to bring them within the volume and temporal requirements of paragraph (1)d. Combs v. Bakker, 886 F.2d 673 (4th Cir. 1989).

Substantial Activities in State Shown. — In a breach of contract action, defendant Georgia corporation had engaged in "substantial activities" within this State so as to invoice the court's in personam jurisdiction under subdivision (1)d where the evidence showed telephone conversations between defendant's representatives located in Georgia and plaintiff's representatives in North Carolina, and where an invoice was mailed by defendant from Georgia to plaintiff in North Carolina and payment of this invoice by check was mailed from North Carolina to defendant in Georgia, and where the evidence also showed other activities not related directly to the action in question, namely, a service called to perform emergency boiler repairs for another company, and the delivery of boiler parts by defendant to another company in North Carolina. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Substantial Activities in State Not Shown. — Where record was devoid of evidence which would support the trial court's presumed finding of "substantial activity within this state" by defendant when service of process was made upon him, subdivision (1) was inapplicable to him. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

For discussion as to application of this section, see Fireman's Fund Ins. Co. v. Washington, 65 N.C. App. 38, 308 S.E.2d 758 (1983), cert. denied and appeal dismissed, 310 N.C. 624, 315 S.E.2d 690 (1984).

VI. LOCAL ACT OR OMISSION.

The term "injury to the person or property," as used in subdivision (3) of this section, should be given a broad meaning, consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit actions thereunder to traditional claims for bodily injury and property damages. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alimony on the ground of abandonment is a claim of "injury to person or property" under subdivision (3) of this section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alienation of affections and for criminal conversation is an action ex delicto and involves "injury to person or property" within the contemplation of this section. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

VII. LOCAL INJURY; FOREIGN ACT.

This section was intended to embrace "intangible injuries." Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

In order to find personal jurisdiction under subdivision (4)(a) of this section, a plaintiff (1) must claim that it suffered an injury within North Carolina which injury arose by a defendant's acts outside the state, and (2) must show that the defendant solicited within North Carolina. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Because plaintiff must establish that a provision of the long-arm statute confers jurisdiction as well as demonstrate that defendants had minimal contacts with North Carolina, plaintiff's failure to meet the first prong of the test under subdivision (4)(a) of this section alleviates the need to consider the due process considerations. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Subdivision (4)a of this section requires that plaintiff only claim injury, etc. —

In accord with paragraph in the 1994 Supplement. See Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Subdivision (4) of this section, as applied to defining the reach of § 75-1.1, requires an in-state injury to plaintiff before plaintiff can state a valid unfair trade claim. The 'In' Porters v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987).

Showing that defendant truck driver picked up or delivered pharmaceuticals in North Carolina on approximately two occasions per week was a sufficient prima facie showing that he was engaged in "service activity" as required by subdivision (4) at or about the time of the claimed injury. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

The defendant need not be physically present in this State to solicit in this State within the meaning of this section. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

It is not necessary for the defendant to be physically present in North Carolina to solicit in the state within the meaning of the statute. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Magazine advertisements are solicitations within the meaning of subdivision (4)a of this section. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Claims for negligent infliction of emotional distress and loss of consortium are injuries to person or property within the purview of subdivision (4). Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Mere allegations are sufficient to satisfy the statutory requirements of subdivision (4)b of this section. Accordingly, plaintiff's prima facie showing, with no rebuttal by defendant, was sufficient to establish jurisdiction under subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Plaintiff's claims of injury from out-of-state defendants' misappropriation of his idea for improvement of defendant's product were sufficient to meet the local injury requirement of subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Allegations Held Sufficient to Satisfy Subdivision (4). — The allegations that defendants were engaged in the business of selling wire art products, and that such products were sold and used in North Carolina in the ordinary course of trade to a substantial extent, were sufficient to satisfy subdivision (4) of this section and the requirements of due process. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Plaintiff's claims of injury from out-of-state defendants' misappropriation of his idea for improvement of defendant's product were sufficient to meet the local injury requirement of subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Where company supplied drug to defendant pharmacies, plaintiff's injuries were caused by his consumption of the product, and the company manufactured, marketed and distributed the drug, the court had statutory authority to exercise jurisdiction over defendants. Tart v. Prescott's Pharmacies, Inc., 118 N.C. App. 516, 456 S.E.2d 121 (1995).

Activities of a nonresident corporation owning a basketball team are included within subdivision (4) of this section. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

VIII. LOCAL SERVICES, GOODS OR CONTRACTS.

Execution of Guaranty Contract as Promise to Pay for Services under Subdivision (5)a. — The execution by the defendant of a guaranty contract by which he guaranteed performance and payment in the event that another defendant should default on a lease was a promise to pay for services to be performed in this State under subdivision (5)a. Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

The promise to deliver goods to a carrier for shipment to North Carolina is sufficient to confer statutory jurisdiction. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Subdivision (5)c of this section confers jurisdiction when a foreign corporation promises to deliver goods to this State. Defendant's promise to deliver the product through a carrier does not deprive North Carolina courts of jurisdiction when the parties to the contract contemplated shipment to North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Receipt of Goods in this State. — Subdivision (5)e of this section gives jurisdiction over a foreign corporation when title to goods passed upon delivery to a carrier in another state, but the plaintiff did not take actual possession until the goods arrived in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Defendant to Pay for Services Performed by Plaintiff. — Where Tennessee defendant agreed to make sales calls on potential customers and solicit orders on behalf of North Carolina plaintiff in several states other than North Carolina, this case fell within the long-arm statute's requirements for personal jurisdiction; the record showed that the defendant had promised to receive and convey payment for plaintiff's services to plaintiff and the plaintiff performed these services in North Carolina. CFA Medical, Inc. v. Burkhalter, 95 N.C. App. 391, 383 S.E.2d 214 (1989).

Attendance at Corporate Meetings. — Where, in a suit to enforce covenants not to compete, defendants personally appeared in North Carolina to take advantage of job training provided by plaintiff for corporate management meetings and training, defendants accepted and ratified the rendition of services (meetings and training) provided by the plaintiff in this state and fell within reach of the long-arm statute. Century Data Sys. v. McDonald, 109 N.C. App. 425, 428 S.E.2d 190 (1993).

Where plaintiff and defendants entered into a sales representation agreement whereby plaintiff agreed to act as a sales representative for defendants in this and other states, and defendants agreed to pay commissions to plaintiff, defendants were within the provisions of subdivisions (5)a and (5)b of this section. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Unreasonable to Assume Bank Anticipated Litigation Everywhere Customers Resided. — Where defendant was an Illinois bank, doing business in Illinois, did not solicit or transact business in North Carolina, and did not have an office or agents in North Carolina, defendant conceded that customers did use funds in North Carolina and some customers were residents of North Carolina, and it was foreseeable to defendant that some customers would use loan proceeds in North Carolina, it was unreasonable to assume that defendant anticipated being hauled into court in every jurisdiction in which its customers resided or used funds. Occidental Fire & Cas. Co. v. Continental Ill. Nat'l Bank & Trust Co., 689 F. Supp. 564 (E.D.N.C. 1988).

Money payment is clearly a thing of value within the meaning of subdivisions (5)c of this section. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Money is a thing of value, and defendant's promise in the note to make payments to plaintiff in North Carolina was clearly a promise to deliver a thing of value within this State, and thus within the purview of this section. Wohlfahrt v. Schneider, 66 N.C. App. 691, 311 S.E.2d 686 (1984).

Money payments are a "thing of value" within the meaning of subdivisions (5)c and (5)d of this section. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Support Payments Are a "Thing of Value" Under Subdivision (5)c. — Since support payments are exchanged for, and in consideration of, an asset or a thing of value, i.e., a release of marital rights, support payments are clearly a "thing of value." Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Money Sent to Defendant to Acquire Options on Real Property. — Where plaintiffs alleged they advanced $67,500 to defendant, at his direction, to be used by him to acquire options on certain real property in South Carolina and to obtain a mobile home for use in the partnership business and plaintiffs maintained that these monies were sent to defendant from Wilkes County, plaintiffs shipped "things of value" to defendant at his direction, and statutory jurisdiction was thus established under subdivision (5)d. Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

"Shipment from This State to Defendant on His Order or Direction." — Where defendant directed plaintiff to send monies owed pursuant to a partnership agreement to him in Alabama and plaintiff distributed the money from North Carolina, the money paid was "shipped from this state by the plaintiff to defendant on his order or direction." Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Subdivision (5)d Provided Basis for Exercise of Personal Jurisdictional over Defendant. — Where there was no question that the valves, seals, pumps, etc. which plaintiff sent to defendant, pursuant to defendant's purchase order, constituted goods shipped from this State by the plaintiff to the defendant on the defendant's order or direction, since plaintiff's action for breach of contract related to those goods, subdivision (5)d of this section plainly provided a statutory basis for this State's exercise of personal jurisdiction over the nonresident defendant. Combustion Sys. Sales v. Hatfield Heating & Air Conditioning Co., 102 N.C. App. 751, 403 S.E.2d 600 (1991).

Letters of Credit Were Not "Other Things of Value". — Letters of credit issued by an Illinois bank and delivered to a North Carolina resident did not constitute "other things of value" under subdivision (5)e and, therefore, no specific jurisdiction was found to bring defendant bank into court in North Carolina. Occidental Fire & Cas. Co. v. Continental Ill. Nat'l Bank & Trust Co., 689 F. Supp. 564 (E.D.N.C. 1988).

IX. CASES DECIDED UNDER PRIOR LAW.

A. General Consideration.

Editor's Note. — *The cases cited below were decided under former § 55-145 and prior law. Former § 55-145 related to jurisdiction over foreign corporations not transacting business in the State.*

Burden of Suing Away from Home Need Not Always Fall on Plaintiff. — There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Benefit and Protection of State Law Gives Rise to Obligations. — To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Where foreign corporation obviously uses, benefits from, or can easily use the laws of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Defendant Must Have Purposely Availed Itself of Privilege of Conducting Activities. — It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Regardless of what other contacts may be present. Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Invoking Privilege of Conducting Business. — By entering into a contract made in this State and to be performed in part in this State, a defendant foreign corporation avails itself of the privilege of conducting its business in this State, thus invoking the benefits and protection of its laws. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Right of State to Require Answer to Claims. — Where the solicited circulation of a corporation's publications account for a relatively significant portion of the corporation's revenue, notions of fair play and substantial justice support the right of the State to require the corporation to answer nonfrivolous claims arising out of its contacts with the State, even though it has managed to reduce its physical presence in the State to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Size of Claim Is Pertinent. — When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As Is Presence of Witnesses and Evidence. — Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Inconvenience to Corporation. — An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And State's Interest in Protecting Residents. — Consideration should be also given to any legitimate interest the State has in protecting its residents with respect to the activities and contacts of the foreign corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

This State has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the State for that purpose. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Whether State's Courts Are Open to Suits by Foreign Corporation. — Consideration should be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As They Are in This State. — The courts of the State have been and now are open to a foreign corporation for protection of its activities and to enforce the valid obligations which residents of this State have assumed by reason of defendant's contacts and activities. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Nonresident has access to the courts of this State and can sue a foreign corporation. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

In Personam Jurisdiction. — The resolution of a question of in personam jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process? However, it has been held that long-arm legislation was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process. Therefore, since the statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion comports with due process. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 603, 330 S.E.2d 611 (1985).

Plaintiff has the initial burden of showing the existence of jurisdiction. The burden is met by a prima facie showing that jurisdiction is conferred by the statute. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

Personal Service Alone Insufficient to Subject Foreign Corporation to Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State Legislature. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Casual Presence or Isolated Activity of Agent. — The casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

If a corporation had insufficient contact or relations with North Carolina to warrant the assertion of jurisdiction over it, the entry of its agent on an isolated occasion to discuss the claim could not supply the necessary tie to give the State power. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

Agent's Activities Not Amounting to Doing Business. — A mere salesman or broker who takes orders and sends them to a foreign corporation for acceptance, or a distributor who buys and takes title to the chattels, is not a managing or local agent and does not result in the corporation doing business in this State. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

Considerations of U.S. Const., Amend. I Are Relevant But Do Not Bar Jurisdiction. — New York Times Co. v. Conner, 365 F.2d 567 (5th Cir. 1966), does not stand for the proposition that, because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication. Rather, Conner indicates that considerations under U.S. Const., Amend. I are a factor relevant to a determination of the jurisdictional question; and the discussion of that factor in Conner must be viewed in its factual context. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

And Such Considerations Are Minimized. — In a libel action against a national magazine publisher, U.S. Const., Amend. I was not totally disregarded in the context of the jurisdictional question under this section, but the consideration given it was minimized. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

In the jurisdictional context, a nonresident defendant publisher has the protection of the rights guaranteed to it by the due process clause of U.S. Const., Amend. XIV, and to interject U.S. Const., Amend. I, with its full impact, into the discussion at this point would unnecessarily confuse an already complex issue. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Since They May Impose Vague Standards on Long-Arm Statutes. — Hazards to publishers from libel actions have been much mitigated by the development of substantive principles under U.S. Const., Amend. I. It is a legitimate question whether this will not sufficiently protect communications media without superimposing a necessarily vague standard under U.S. Const., Amend. I upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

B. Minimum Contacts.

Sufficiency of Contacts and Manner of Service Present Due Process Question. — Whether a foreign corporation has sufficient contacts within the State to subject it to service of process in an action in personam, and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Requirements of Due Process. — Due process requires only that, in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

A State court may acquire in personam jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

Whether the exercise of jurisdiction under former § 55-145(a)(1) comported with due process hinged on whether the nonresident defendant had certain "minimum contacts" with North Carolina such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice. These contacts could not be the result of the "unilateral activity" of those who claimed some relationship with the defendant; rather, it was essential that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within this State. Unitrac, S.A. v. Southern Funding Corp., 75 N.C. App. 142, 330 S.E.2d 44 (1985).

However minimal the burden of defending in a foreign tribunal, a defendant foreign corporation may not be called upon to do so unless he has had the "minimal contacts" with that state that are prerequisite to its exercise of power over him. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Criteria for Subjecting Corporation to Suit Generally. — The criteria by which the boundary line is marked between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972).

Essential requirements of "minimum contacts" for obtaining jurisdiction under this section are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Tom Togs, Inc. v. Ben Elias Indus. Corp., 76 N.C. App. 663, 334 S.E.2d 105 (1985), rev'd on other grounds, 318 N.C. 361, 348 S.E.2d 782 (1986).

The criteria for determining whether minimum contacts exist include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985).

Contact Is Crux of Jurisdictional Investigation. — While the forum state's impact upon the defendant's business is a relevant factor which cannot be overlooked, far greater weight should be given to the contact that the defendant's business has with the markets of the forum state. The latter is the crux of the jurisdictional investigation. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Question of Minimum Contacts Is Determined by Applying Fact Situation to Law. — The question of whether there are, in fact, sufficient minimum contacts with a territorial entity by a defendant must be determined by applying the fact situation before the court to the law as it has been set forth by the legislative and judicial authorities. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Substantial contacts with the State would be required to bring a corporation within former § 55-145(a). Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

Minimum contacts exist if foreign company's activity is regular, or systematic, or continuous. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Where Activity Continuous and Systematic, No Doubt of Presence in State. — Presence in this State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but have also given rise to the liabilities sued on, even though no consent to be sued or authorization to accept service has been given. Babson v. Clairol, Inc., 256 N.C.

227, 123 S.E.2d 508 (1962); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

And No Violation of Due Process. — When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Continuing Business with Substantial Contacts Affords Jurisdiction. — Where the defendant's business was a continuing one and a substantial portion of the plaintiff's alleged cause of action arose out of substantial contacts within the State, the minimum contacts necessary to the jurisdiction of this State's courts exist. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Substantial Contacts Make Exercise of Jurisdiction Just. — Direct, substantial and uninterrupted contacts by a foreign corporation with this State make it reasonable and just for the court to exercise its jurisdiction over such foreign corporation as authorized by this section. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Reducing Physical Contacts to Minimum Does Not Bar Suit. — Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market, to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Activity Held Not to Establish Minimum Contacts. — Where a real estate corporation never had an office or agent in this State, it has never advertised or solicited business here, and the cause of action did not result from a sale by the corporation to someone then in this State, nor could the corporation expect to benefit from or use the laws of this State to enforce any obligations, this would not establish the minimum contacts required to ensure due process. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Occasional visits by an out-of-state car dealer to the regional office of the manufacturer in this State, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Service of Abusive Process. — If an out-of-state defendant causes abusive process to be served upon an in-state plaintiff, and the plaintiff subsequently sues the defendant in plaintiff's state, the state wherein the alleged abusive process was served, on a cause of action arising out of such abusive service of process, personal jurisdiction exists over the out-of-state defendant. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

Jurisdiction Held to Exist. — In an action to recover a deposit paid pursuant to a manufacturing contract, jurisdiction existed over defendant foreign corporation where plaintiff domestic corporation had contracted with it to manufacture products using components supplied by plaintiff, and it was contemplated that some of the products would be sold in North Carolina. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

C. Solicitation of Business in State.

Contract Evidenced by Telegraph and Mail Communication. — In an action by plaintiff to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in this State, the trial court did not err in denying defendant's motion to dismiss for lack of in personam jurisdiction where the evidence tended to show that all communication concerning the transaction was conducted by telegraph and by mail and that both parties considered themselves to have executed a contract since such evidence was sufficient to show that a contract was made in this State so that defendant had sufficient contacts with North Carolina to subject it to suit here. General Time Corp. v. Eye Encounter, Inc., 50 N.C. App. 467, 274 S.E.2d 391 (1981).

D. Goods Expected to Be Used or Consumed in State.

Constitutionality of Former § 55-145(a) Involved Due Process Question. — The constitutionality of former § 55-145(a) involved a question of due process of law, to be determined in accordance with the decisions of the Supreme Court of the United States, and in this connection International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945), was decisive. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Former § 55-145(a)(3) Was Not Violative of Any Provision of the North Carolina Constitution. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Liability for Defective Goods Sold to Wholesaler in State. — A foreign corporation selling home appliances to wholesalers in North Carolina was subject to service of process under former § 55-145(a)(3) in an action by a resident of this State to recover for personal injury allegedly resulting from a defective appliance manufactured by the foreign corporation, notwithstanding that title to appliances sold by the corporation in this State passed to the wholesalers at the point of shipment outside of this State and notwithstanding that the foreign corporation maintained no agents or employees here except agents for the solicitation of orders which were subject to approval by the home office, and such service subjected the foreign corporation to a judgment in personam. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959).

Former § 55-145(a)(3) Was Inapplicable Where Machine Sold Never Entered State. — Former § 55-145(a)(3) was not applicable to an action for breach of a sales contract by a seller in another state, where the machine sold to buyers in this State under the contract had never entered this State nor been used here. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Contacts Held Insufficient for Jurisdiction. — Where the parties were both commercial concerns dealing on equal footing at arm's length, and the defendant had never solicited, advertised, or transacted business in this State, and its only contact with this State was the contract in suit, which was made and substantially performed in another state, it was held that to subject the defendant to the in personam jurisdiction of the courts in this State under former § 55-145(a)(3) would violate due process. Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

Former § 55-145(a)(3) was unconstitutional as applied to an action for libel against a foreign publishing corporation which delivered magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employed sales promotion representatives who made only occasional visits in this State, since such corporation had no contacts, ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment in personam. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

§ 1-75.5. Joinder of causes in the same action.

CASE NOTES

Quoted in Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

§ 1-75.6. Personal jurisdiction — Manner of exercising by service of process.

CASE NOTES

Applied in Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

§ 1-75.7. Personal jurisdiction — Grounds for without service of summons.

CASE NOTES

"General Appearance" to Be Given Liberal Construction. —

The concept of a general appearance should be given a liberal construction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Meaning of "General Appearance". —

In accord with second paragraph in the original. See Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984); Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

In accord with third paragraph in the main volume. See Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Where defendant generally appeared in case by moving for a change of venue, by filing answers to both the complaint and amended complaint, by responding to plaintiff's motion for summary judgment, by filing three different motions or amended motions of her own for summary judgment, by moving or requesting on several different occasions that the case be calendared for trial, and by participating in summary judgment hearing, the court had jurisdiction over her. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Where, before making his motion to dismiss for lack of jurisdiction, husband filed a notice of appeal, a petition for writ of supersedeas, a petition for writ of certiorari, and a notice of dismissal, the husband would be held to have entered a general appearance and waived his right to contest personal jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

In filing a motion to claim exempt property defendant made a general appearance, and her subsequent motion for relief from judgment on the grounds of the invalidity of service of process was properly dismissed. Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Objections to lack of jurisdiction over the person may be waived by voluntary appearance. This includes objections. Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

General Appearance Confers Jurisdiction Despite Defect in Service. —

Where defendant and his counsel appeared in court and proceeded with the matter without contesting the court's jurisdiction for lack of service of process, defendant submitted himself to the jurisdiction of the court and thus, effectively waived any defect in service of process and service thereof. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

General Appearance in Child Custody Proceeding. —

By submitting information to the court in action for child support, custody and support, defendant made a general appearance prior to his assertions of lack of personal jurisdiction. Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994).

Motion for Change of Venue. — The nonresident defendant, by moving for a discretionary change of venue pursuant to § 1-83(2) without first or simultaneously asserting his § 1A-1, Rule 12 (b) defenses relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Filing of Answer without Contesting Jurisdiction. — Where defendant, in his answer, made a motion under § 1A-1, Rule 12(b)(6), and a res judicata motion, without making a motion to contest personal jurisdiction, his right to challenge the court's exercise of personal jurisdiction over him was waived. Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988).

Applied in Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993); Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139, cert. denied, 336 N.C. 781, 447 S.E.2d 424 (1994).

Cited in Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

§ 1-75.8. Jurisdiction in rem or quasi in rem — Grounds for generally.

CASE NOTES

State Courts Given Full Jurisdictional Powers Permissible Under Federal Due Process. — While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as to actions in personam, it is also clear that the General Assembly in enacting subdivision (3) of this section intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

One of the parties to a divorce action based upon one year's separation must be resident of this State for six months next preceding the filing of the divorce action. This residency requirement is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed in rem under subdivision (3) of this section. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

Jurisdiction over Out-of-State Lottery Ticket. — Where court attempted to exercise in rem jurisdiction over winning Virginia lottery ticket the order was invalid, because the ticket was in Virginia, and the court could not exercise in rem jurisdiction over personal property located outside this state. Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994), cert. denied, 336 N.C. 778, 447 S.E.2d 418 (1994).

Equitable Distribution. — Assuming arguendo that the North Carolina "long-arm" statutes gave North Carolina courts jurisdiction over defendant for purposes of equitable distribution, application of those statutes would violate the due process clause of U.S. Const., Amend. XIV, where defendant had not lived in this state for any part of the marriage, and where, although certain property of the parties was located in this state, there was no indication of any action by defendant purposely directed towards this state. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Applied in Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989).

Cited in Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

CASE NOTES

Failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Sheriff's Certificate. — When a defendant appears in the action and challenges the sufficiency of service upon him, proof of the service of process shall be by the sheriff's certificate showing place, time and manner of service. Sun Bank/South Fla. v. Tracy, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

Officer's Return Held, etc. —

Where the affidavit and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business, and there is no showing from the affidavit that defendant herself received a copy of the summons and complaint, the trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Applied in Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991).

Quoted in Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987).

Cited in First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986); Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580 (M.D.N.C. 1986); Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993); Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241 (1994).

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

CASE NOTES

Strict Construction. — Statutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Cited in Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

CASE NOTES

This section does not deny litigants access to North Carolina courts in violation of N.C. Const., Art. I, § 18, but merely postpones litigation here pending the resolution of the same matter in another sovereign court. Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Relevant facts that may be considered, etc. —

In accord with the main volume. See Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Standard of Review. — Entry of an order under this section is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Applied in American Motorists Ins. Co. v. Avnet, Inc., 98 N.C. App. 385, 391 S.E.2d 50 (1990); Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 435 S.E.2d 571 (1993).

Stated in Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

CASE NOTES

I. In General.
II. Actions Relating to Real Property.
  A. In General.
  B. Local Actions.
  C. Transitory Actions.
V. Recovery of Personal Property.

I. IN GENERAL.

Effect of Contract Stipulation Regarding Venue. —

Contract provision specifying an exclusive forum was of no effect. Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992).

Venue Consideration Limited to Allegation in Plaintiff's Complaint. — For purposes of determining venue, consideration is limited to the allegations in plaintiff's complaint. Thus, the court could not consider defendants' allegations in their counterclaim in determining propriety of removal. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Right to Appeal. — Trial court's grant of defendants' motion for change of venue in an action for declaratory relief regarding existence of a lease in which plaintiff was lessee and defendants were lessors was immediately appealable, as a right to venue established by statute is a substantial right. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Action for Declaratory Relief. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Appeal of Denial of Motion. — Denial of a motion for change of venue as a matter of right under this section, although interlocutory, is directly appealable. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Applied in Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Quoted in M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

Stated in Roanoke Properties v. Spruill Oil Co., 110 N.C. App. 443, 429 S.E.2d 752 (1993).

II. ACTIONS RELATING TO REAL PROPERTY.

A. In General.

Local and Transitory Actions, etc.—

When this section controls an action's venue, the venue is considered "local," because the action must be tried in the county which is the situs of the land whose title is affected by the action. Conversely, an action is "transitory" when it does not directly affect title to land, and it must be tried in the county in which at least one of the parties resides when plaintiff commences suit. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Title to realty must be directly affected by the judgment, etc. —

Title to realty must be directly affected by a judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein. It is the principal object involved in the action which determines the question. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Unless defendant waives proper venue, an action is local and must be tried in the county where the land lies if the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Pursuant to this section, an action must be tried in the county where the property is located when the judgment to which a plaintiff would be entitled upon the allegations of the complaint will affect the title to land. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Recovery of Real Property. — This section creates special, mandatory venue rules for certain actions, requiring trial in the county in which the subject of the action is situated, where the action involves: recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. Rose's Stores, Inc. v. Bradley Lumber Co., 105 N.C. App. 91, 411 S.E.2d 638 (1992).

Allegations of Complaint to Be Considered. — In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

B. Local Actions.

An action for termination of a leasehold requires removal, under this section, to the county where the leased property is situated. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Action Seeking Declaration of Nonexistence of Leasehold Interest. — Local venue was proper in a declaratory action in which the "principal object" was a determination of leasehold estate or interest in real property. It was irrelevant that the thrust of plaintiff's action was to have the court declare the nonexistence of his leasehold interest, rather than its existence, and that the judgment would operate in personam, as the judgment would also directly affect title to the property. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

C. Transitory Actions.

An action will be transitory only if judgment operates "alone" in personam against the parties and not directly on an estate or title. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Interpretation of Lease. — In a case in which plaintiffs sought a declaratory judgment as to the parties' rights under a lease agreement and sought to enjoin defendant from bringing a separate ejectment action pending a determination of rights under the lease, and the primary question to be resolved was interpretation of the lease in light of certain legislative changes, resolution of which question would not directly affect title or interest in the property, the action did not have to be tried in the county in which the property was located. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Judicial declaration as to whether plaintiff was obligated to make rental payments for rock quarried from land adjacent to leased premises would not directly affect title to the land, and thus did not, for venue purposes, involve the recovery of an interest in real property. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

V. RECOVERY OF PERSONAL PROPERTY.

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under subdivision (4) and § 1-83(1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Action Held to be One for the Recovery of Real Property. — The trial court properly determined that mortgage successor's pursuit of a judgment declaring an option agreement pursuant to which realty company was given the opportunity to purchase outright at a discount the note and deed of trust held by seller's trustee, constituted an action for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest pursuant to this section and therefore required that the action be tried in county where the land was located. Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 125, 431 S.E.2d 225 (1993).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

CASE NOTES

Trial court did not err in granting defendant's motion for change of venue pursuant to §§ 1-83 and 1-76.1 in action for deficiencies resulting from foreclosure sales of personal property. First S. Sav. Bank v. Tuton, 114 N.C. App. 805, 443 S.E.2d 345, cert. denied, 338 N.C. 309, 452 S.E.2d 309 (1994).

Quoted in M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

§ 1-77. Where cause of action arose.

CASE NOTES

I. In General.
III. Against Public Officers, etc.

I. IN GENERAL.

Cited in Vinson v. Wallace, 96 N.C. App. 372, 385 S.E.2d 810 (1989).

III. AGAINST PUBLIC OFFICERS, ETC.

Municipal Corporations. —
Ordinarily, the proper venue for an action against a municipality would be the county where the cause of action arose and if an action is instituted in some other county, the municipality has the right to have the action removed to the proper county. Jarrell v. Town of Topsail Beach, 105 N.C. App. 331, 412 S.E.2d 680 (1992).

§ 1-78. Official bonds, executors and administrators.

CASE NOTES

The proper venue for actions against executors and administrators, etc. —
Under this section, if an action is against an executor in his official capacity, it must be instituted in the county in which he qualified. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

§ 1-79. Domestic corporations.

CASE NOTES

Domesticated foreign corporations, etc.—
In accord with first paragraph in the main volume. Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988).

Removal Held Improper. — Under § 1A-1, Rule 15(c), when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant, and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. Thus, since corporate defendant was a resident of Wake County for venue purposes, because it had a place of business there, and was deemed to have been a defendant in the action at its commencement by operation of § 1A-1, Rule 15(c), although it was not added until later, venue there was not improper, and order of removal was erroneous. Oak Manor, Inc. v. Neil Realty Co., 88 N.C. App. 402, 363 S.E.2d 382, cert. denied, 322 N.C. 482, 370 S.E.2d 226 (1988).

§ 1-82. Venue in all other cases.

CASE NOTES

Action Brought by Migrant Worker. — Venue was proper where plaintiff, a migrant farm worker, filed an action in the county where he resided when the action was filed. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Removal Held Improper. — Under § 1A-1, Rule 15(c), when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant, and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. Thus, since corporate defendant was a resident of Wake County for venue purposes, because it had a place of business there, and was deemed to have been a defendant in the action at its commencement by operation of § 1A-1, Rule 15(c), though not added until later, venue there was not improper, and order of removal was erroneous. Oak Manor, Inc. v. Neil Realty Co., 88 N.C. App. 402, 363 S.E.2d 382, cert. denied, 322 N.C. 482, 370 S.E.2d 226 (1988).

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Cited in Vinson v. Wallace, 96 N.C. App. 372, 385 S.E.2d 810 (1989).

§ 1-83. Change of venue.

CASE NOTES

I. In General.
II. Where County Designated Is Not Proper.
III. Where Convenience of Witnesses and Ends of Justice Would Be Promoted.
IV. Application for Removal.

I. IN GENERAL.

Trial court did not abuse its discretion by denying defendant's motion for change of venue for convenience in action brought by developer of a marina. Roanoke Properties v. Spruill Oil Co., 110 N.C. App. 443, 429 S.E.2d 752 (1993).

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Trial court did not err in granting defendant's motion for change of venue pursuant to §§ 1-83 and 1-76.1 in action for deficiencies resulting from foreclosure sales personal property. First S. Sav. Bank v. Tuton, 114 N.C. App. 805, 443 S.E.2d 345, cert. denied, 338 N.C. 309, 452 S.E.2d 309 (1994).

Quoted in Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Cited in DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984); Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987); York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988); Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 125, 431 S.E.2d 225 (1993).

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

The trial court has no discretion, etc. —
When the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under § 1-76(4) and subdivision (1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

III. WHERE CONVENIENCE OF WITNESSES AND ENDS OF JUSTICE WOULD BE PROMOTED.

Motion Is Addressed, etc. —
A decision to change venue to promote the convenience of witnesses and ends of justice is addressed to the sound discretion of the trial judge and will not be overturned unless there is a showing of abuse. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

And Is Not Reviewable Absent Abuse. —
In accord with second paragraph in the main volume. See Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

When Refusal to Remove, etc. —
In accord with first paragraph in the main volume. See Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

IV. APPLICATION FOR REMOVAL.

And before Answering to Merits. —
The defendant who files answer to the merits before raising his objection to venue, waives the right. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

If the motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

§ 1-84. Removal for fair trial.

CASE NOTES

Cited in York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

§ 1-87. Transcript of removal; subsequent proceedings; depositions.

CASE NOTES

Cited in Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.

The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner:

(1) By leaving a copy thereof, with a fee of ten dollars ($10.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section, shall be sufficient service upon the said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by certified or registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the certified or registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the certified or registered letter is not delivered

to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident motorist.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491; 1967, c. 954, s. 4; 1971, c. 420, s. 2; 1975, c. 294; 1989, c. 645, s. 1.)

CASE NOTES

I. General Consideration.
  A. In General.
  B. Proof to Sustain Service of Process.
II. Procedure for Service and Notice.

I. GENERAL CONSIDERATION.

A. In General.

Editor's Note. *— All of the case notes which previously appeared in the main volume and cumulative supplements under analysis line I., In General, have been reprinted below, along with annotations taken since the publication of the 1990 Cumulative Supplement. The reprinting of these case notes was necessary to accommodate new case note analyses.*

This section is constitutional and valid. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931); Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939); Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its police power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

The requirement of this section for mailing a copy of the process to a nonresident motorist's last known address provides sufficient assurance of actual notice so as to meet minimum due process requirements and to provide a constitutional basis for personal jurisdiction of a nonresident motorist who is served in conformity with this section. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

It Affects a Substantial Right. — This section is not remedial or curative, but affects a substantial right. Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

And Is Not Retroactive. — Appointment of the Commissioner under this section is contractual, and the statute is not to be given retroactive effect; hence, service of process under this section in an action accruing before the effective force thereof is void. Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

Purpose of Section. — The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina residents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

A narrow interpretation of this section would defeat its purpose. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

This Section Must Be Strictly Construed. — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed, both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

And Strictly Complied With. — The provisions of this section are in derogation of the common law and must be strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The provisions of this section are in derogation of the common law and must be strictly complied with, to the extent that actual notice given in any manner other than that prescribed by the statute cannot supply constitutional validity to it or to service under it. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

While this section must be strictly construed because it is in derogation of the common law, where the possibility of confusion among people of ordinary intelligence is virtually impossible, a summons should not be found invalid simply because of technical mistakes or poor wording. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

This section does not in any way change or amend the law governing the commencement of actions or the contents of a summons. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

But Provides Artificial Method of Serving Process. — This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Statutes in Pari Materia. — Sections 20-22, 20-37, 20-38 (now repealed) and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a vehicle on the public highways of the State, deal with the same subject matter and must be considered in pari materia. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

This section and former § 1-89, relating to contents and return of summons, were to be construed together and strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967). As to summons, see now § 1A-1, Rule 4.

Section Not in Conflict with § 1-21. — This section and § 1-105.1 are not in conflict with and do not repeal § 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

This section does not warrant service upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. Lindsay v. Short, 210 N.C. 287, 186 S.E. 239 (1936).

Section Applies to Action on Judgment Entered in Another State. — This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of process on defendant by service on the Commissioner under the provisions of this section is valid. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), rev'd on other grounds, 220 N.C. 648, 18 S.E.2d 162 (1942).

Section 1-105.1 makes this section applicable to residents of the State who leave and remain without the State subsequent to an accident. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Before the enactment of § 1-105.1, the method of serving process on a nonresident provided in this section and former § 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or was in the armed services of the United States and stationed in another state or foreign country. Foster v. Holt, 237 N.C. 495, 75 S.E.2d 319 (1953).

Before the 1953 amendment, this section made no provision for service on the personal representative of a deceased automobile owner who died after an accident occurring in this State and before service of process, and service under the statute upon such personal representative conferred no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935).

Purpose and Scope of 1953 Amendment. — Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and significant effect of the 1953 amendment. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

1953 Amendment Authorizes Service on Personal Representative of Deceased Nonresident. — The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

This section clearly permits nonresident administrators to be sued in the State, in actions "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle [anywhere within the State]." Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

The overwhelming weight of authority sustains the assertion of jurisdiction over personal representatives of nonresident motorists. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

While North Carolina, by virtue of this section, permits a suit against the nonresident administrator of a motorist who became involved in an auto accident in North Carolina, nonresident administrators are otherwise held to lack the capacity to sue or be sued. However, the argument that the lack of capacity to initiate suit, while having capacity to be sued, renders a statute like this section "grossly unfair" has been specifically rejected. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

The legislature, by the 1955 amendment, intended only to broaden the area of vehicular operation to include private ways and places on land not within the confines of public highways. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

And did not intend to enlarge and extend the meaning of the words "motor vehicle." The 1955 amendment did not undertake to change the type of vehicle, but merely enlarged the sphere of its operation. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

Meaning of "Motor Vehicle". — The

ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

An airplane is not a "motor vehicle" within the purview of this section. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

Term "Public Highways" Includes Public Streets. — When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the "public highways" of North Carolina, it covered accidents on public streets as well as public roads, for both are public highways. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

B. Proof to Sustain Service of Process.

To sustain service of process upon defendant under this section pursuant to § 1-105.1, the plaintiffs must show either: (1) That defendant had established a residence outside the State subsequent to the accident or collision, or (2) That he had left the State subsequent to the collision complained of and remained absent from the State for 60 days or more continuously. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Defendant Held Sufficiently Identified in Summons. — In an action for damages against a nonresident arising from his operation of a motor vehicle in this state, where summons was served to the Commissioner of Motor Vehicles pursuant to this statute, there was no possibility of misunderstanding as to who the true defendant was where defendant's name and address were listed directly under the Commissioner and defendant's name appeared both in the caption of the case and in the accompanying complaint. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

Residence of defendant at time of accident controlled the application of this section, § 1-105.1 and former § 1-107 under federal Rule 4(d)7. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Resident of Canada Is "Nonresident". — A resident of Canada who operated an automobile involved in an accident on a public highway in this State was a "nonresident" within the purview of this section. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

Member of Armed Services and Wife Stationed Here Under Military Orders. — Where the evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, was sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under this section. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

Conclusive Effect of Finding of Nonresidence on Appeal. — The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, was conclusive on appeal. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931).

State May Assert Jurisdiction over Owner As Well As Driver. — The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Ownership of property, particularly

that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

But Neither Ownership Nor Physical Presence Is Necessary. — By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence insofar as his amenability to constructive service of process is concerned. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

Car Must Be Operated by, for or Under Direction or Control of Nonresident Defendant. — This section provides for constructive service of process upon a nonresident defendant in either of the following situations: (1) Where the nonresident was personally operating the vehicle; or (2) Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. Smith v. Haughton, 206 N.C. 587, 174 S.E. 506 (1934); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

Owner May Be Presumed to Have Right of Control. — An automobile owner may not unreasonably be presumed to have a right to exercise control. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

And Unlikelihood That He Will Exercise It Is Immaterial. — The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Owner Need Not Be Physically in a Position to Direct Driver. — This section does not require that the owner be physically in a position to direct the driver's every move. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

The words "express or implied" suggest only a minimal connection between the driver and the owner, which is satisfied if the owner has a legal right to control the operation of the automobile. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Driver Need Not Be Acting for Pecuniary Benefit of Owner. — This section does not require that the driver be acting for the pecuniary benefit of the owner. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

The "family purpose" doctrine is not determinative in interpreting this section where "control or direction" are the standards. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Family-Purpose Automobile Operated by Son of Owner. — A family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

Evidence Held Sufficient to Show Control by Nonresident Defendant. — An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supported the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section, and in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner was valid. Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939). See also, Queen City Coach Co. v. Chattanooga Medicine Co., 220 N.C. 442, 17 S.E.2d 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, was sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner. Crabtree v. Burroughs-White Chevrolet Sales Co., 217 N.C. 587, 9 S.E.2d 23 (1940).

For additional case holding evidence sufficient to show control of motor vehicle by nonresident defendant, see Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

Evidence Held Insufficient to Show Control. — Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner was void. Blake v. Allen, 221 N.C. 445, 20 S.E.2d 552 (1942).

For case holding findings of fact sufficient to support service under this section, see Winborne v. Stokes, 238 N.C. 414, 78 S.E.2d 171 (1953).

Applied in MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948); Todd v. Thomas, 202 F. Supp. 45 (E.D.N.C. 1962); Lamb v. McKibbon, 15 N.C. App. 229, 189 S.E.2d 547 (1972); Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989).

Quoted in Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

Stated in DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985).

Cited in Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950); Ellington v. Milne, 14 F.R.D. 241 (E.D.N.C. 1953); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964); Seabrooke v. Hagin, 83 N.C. App. 60, 348 S.E.2d 614 (1986).

II. PROCEDURE FOR SERVICE AND NOTICE.

Summons which was directed to the Commissioner of Motor Vehicles rather than to defendant was not fatally defective where it was clearly directed to the Commissioner in his representative capacity as process agent for defendant. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Affidavit Held Sufficient to Support Service by Certified Mail. — Where the plaintiff filed an affidavit of compliance, as required by subdivision (3) of this section, showing that a copy of summons and complaint was mailed to the defendant at her last known address by certified mail, return receipt requested, and that it was returned undelivered because it was unclaimed, the plaintiff showed sufficient compliance with subdivision (2) of this section, to confer jurisdiction, notwithstanding his use of certified rather than registered mail. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinions of the Attorney General numbered 41 N.C.A.G. 567 (1971) and 42 N.C.A.G. 110 (1972), cited under this section in the main volume, have been withdrawn. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).*

Service of Process. — Service upon the Commissioner of Motor Vehicles, in a manner consistent with § 1A-1, Rule 4, meets the requirement of this section. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service of process pursuant to this section and § 1-105.1 upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshal is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State.

OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The opinion of the Attorney General numbered 42 N.C.A.G. 110 (1972), cited under this section in the main volume, has been withdrawn. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).*

Service of process pursuant to § 1-105 and this section upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshal is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

§ 1-108. Defense after judgment set aside.

CASE NOTES

Effect on Title When Judgment Is Set Aside. — This section provides that the conveyance of title to property sold pursuant to a judgment, as acquired in good faith, is not automatically affected when the judgment is subsequently set aside, but that title to such property may, in fact, be affected if the court deems it necessary in the interest of justice. Town of Cary v. Stallings, 97 N.C. App. 484, 389 S.E.2d 143 (1990).

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Bond required of plaintiff for costs.

At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars ($200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.

(3) File a copy of an order from a superior or district court judge or clerk of a superior court authorizing the plaintiff to sue as an indigent.

The requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R.C., c. 31, s. 40; C.C.P., s. 71; Code, s. 209; Rev., s. 450; C.S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989; 1971, c. 268, s. 3; 1993, c. 435, s. 4.)

Editor's Note. — Session Laws 1993, c. 435, s. 4, which amended this section, was effective October 1, 1993, and was applicable to all suits or appeals prosecuted on or after that date.

CASE NOTES

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of this section and § 1-111 have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Notice of Effect of Noncompliance. — This section provided plaintiffs, who were ordered by the trial court to post bond, ample notice that failure to comply with the order within 30 days would make their action subject to dismissal at any time. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Discretion to Impose Lesser Sanction. — Though this section grants a trial court discretionary authority to dismiss an action as the sanction for violation of a court order imposing a prosecution bond, the court retains its inherent discretionary authority to impose a lesser sanction. Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993).

A prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

In property dispute requiring a survey, the trial court had authority to require plaintiffs to post a bond in the amount of $2,700.00 and to dismiss the action for failure to post that bond ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Cited in Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

OPINIONS OF ATTORNEY GENERAL

This section is inapplicable to actions pending in Small Claims Court. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

The plaintiff's prosecution bond set out in this section is one of the provisional or incidental remedies which are not obtainable while a civil action is pending before the magistrate by virtue of the last sentence of § 7A-231. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

§ 1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.

(a) Subject to the provisions of subsection (b) of this section with respect to prison inmates, any superior or district court judge or clerk of the superior court may authorize a person to sue as an indigent in their respective courts when the person makes affidavit that he or she is unable to advance the required court costs. The clerk of superior court shall authorize a person to sue as an indigent if the person makes the required affidavit and meets one or more of the following criteria:

(1) Receives food stamps.
(2) Receives Aid to Families with Dependent Children (AFDC).
(3) Receives Supplemental Security Income (SSI).
(4) Is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons.
(5) Is represented by private counsel working on the behalf of or under the auspices of a legal services organization under subdivision (4) of this section.

A superior or district court judge or clerk of superior court may authorize a person who does not meet one or more of these criteria to sue as an indigent if the person is unable to advance the required court costs. The court to which the summons is returnable may dismiss the case and charge the court costs to the person suing as an indigent if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious.

(b) Whenever a motion to proceed as an indigent is filed pro se by an inmate in the custody of the Department of Correction, the motion to proceed as an indigent and the proposed complaint shall be presented to any superior court judge of the judicial district. This judge shall determine whether the complaint is frivolous. In the discretion of the court, a frivolous case may be dismissed by order. The clerk of superior court shall serve a copy of the order of dismissal upon the prison inmate. If the judge determines that the inmate may proceed as an indigent, service of process upon the defendant shall issue without further order of the court. (C.C.P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C.S., s. 494; 1971, c. 268, s. 4; 1993, c. 435, s. 1; 1995, c. 102, s. 1.)

Editor's Note. — Session Laws 1993, c. 435, s. 1, which rewrote this section, was effective October 1, 1993, and was applicable to all suits or appeals prosecuted on or after that date.

Effect of Amendments. — The 1995 amendment, effective May 25, 1995, and applicable to actions filed on or after that date, added "suits filed pro se by prison inmates" to the catchline; added the subsection (a) designation; added "Subject to the provisions of subsection (b) of this section with respect to prison inmates" to the beginning of subsection (a); and added subsection (b).

Legal Periodicals. —

For an article on indigent defendant's right to psychiatric assistance, see 17 N.C. Cent. L.J. 208 (1988).

CASE NOTES

Editor's Note. — *The cases below were decided under this section as it read prior to the 1993 amendment, which formerly provided for suit as a pauper.*

Discretion of Court. —

The right to sue as a pauper is a favor

granted by the court and remains throughout the trial in the power and discretion of the court. In re McCarroll, 313 N.C. 315, 327 S.E.2d 880 (1985).

Trial de Novo of Small Claims Action. — Plaintiff or defendant may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Ownership of House. — District judge erred in entering order denying petition to appear in forma pauperis of defendant who owned a home valued at $27,150 and other unencumbered personal property in view of abundant evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness and unreasonableness of selling her house. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

§ 1-111. Defendant's, for costs and damages in actions for land.

CASE NOTES

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of § 1-109 and this section have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

OPINIONS OF ATTORNEY GENERAL

The purpose of the bond is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

This section has no application except in actions such as common law land repossession cases, where a defendant is required to plead. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Summary ejectment proceedings pursuant to Chapter 42 are a landlord's "exclusive remedy" to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as this section, to apply to summary ejectment proceedings. See opinion of Attorney General Mr. Thurmon B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

In summary ejectment actions defendant's are not required to post bond before pleading. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

(1) Actions affecting title to real property;
(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
(3) Actions in which any order of attachment is issued and real property is attached.

(b) Notice of pending litigation shall contain:

(1) The name of the court in which the action has been commenced or is pending;
(2) The names of the parties to the action;
(3) The nature and purpose of the action; and
(4) A description of the property to be affected thereby.

(c) Notice of pending litigation may be filed:

(1) At or any time after the commencement of an action pursuant to Rule 3 of the Rules of Civil Procedure; or
(2) At or any time after real property has been attached; or
(3) At or any time after the filing of an answer or other pleading in which the pleading party states an affirmative claim for relief falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C.C.P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C.S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — This section has been set out in the supplement to correct an error in the main pamphlet.

CASE NOTES

Doctrine of Lis Pendens Stated. — Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

When Lis Pendens May Be Filed. — Subsection (a) of this section makes clear that if neither a foreclosure nor an attachment order are involved, a lis pendens may be filed only where a legitimate interest in real property may lie. Zinn v. Walker, 87 N.C. App. 325, 361 S.E.2d 314 (1987), cert. denied, 321 N.C. 747, 366 S.E.2d 871 (1988).

U.S. Government's Interest. — Because the U.S. Government's interest under 18 U.S.C. § 981 and 21 U.S.C. § 881 (federal drug seizure and forfeiture laws) in a property relates back to the time of an illegal act, a property became attached pursuant to subdivision (c)(2) of this section prior to or shortly after the government filed the notice of lis pendens. The government's interest in the property vested as soon as the property was used in an illegal manner. Thus, a notice of lis pendens is valid and necessary to place the world on notice of the government's interest in the property. In re Certain Real Property Located at Lot 8, 763 F. Supp. 150 (W.D.N.C. 1991).

Notice of Lis Pendens Held Subject to Dismissal. — Notice of lis pendens relating to a civil case seeking damages from defendant bank for converting debtor's funds, causing debtor to lose its property, and thereby damaging debtor's general partners, was an attempt to indirectly challenge the sale of real property in a state court proceeding which had been removed to the bankruptcy court. Because the notice of lis pendens was not related to the type of action described in subsection (a) of this section, the notice would be dismissed. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

Remedy for Improperly Filed Lis Pendens. — Defendant failed to prove a basis upon which to recover for damages allegedly resulting from an improperly filed lis pendens where defendant failed to allege any malicious intent on the part of plaintiff, and no evidence of malice was found in the record. Quinn v. Quinn, 111 N.C. App. 922, 433 S.E.2d 807 (1993).

Applied in Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984); Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Cited in Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); United States v. Life Ins. Co., 647 F. Supp. 732 (W.D.N.C. 1986); Carter v. HCL Leasing Corp. (In re Martin), 87 Bankr. 394 (Bankr. E.D.N.C. 1988); K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

§ 1-118. Effect on subsequent purchasers.

CASE NOTES

Applied in Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

§ 1-120. Cancellation of notice.

CASE NOTES

Cancellation by Bankruptcy Court. — Where although the action in which a lis pendens was filed was commenced in the Superior Court Division of the General Court of Justice for Wake County, where the civil suit was subsequently removed to the bankruptcy court, the bankruptcy court was the appropriate court to enter an order pursuant to this section for cancellation of the lis pendens of record. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

§ 1-120.1. Article applicable to suits in federal courts.

CASE NOTES

Cancellation by Bankruptcy Court. — Where although the action in which a lis pendens was filed was commenced in the Superior Court Division of the General Court of Justice for Wake County, where the civil suit was subsequently removed to the bankruptcy court, the bankruptcy court was the appropriate court to enter an order pursuant to § 1-120 for cancellation of the lis pendens of record. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

§ 1-120.2. Filing of notice by cities and counties in certain cases.

The governing body of a city or county may, by ordinance under Part 5 of Article 19 of Chapter 160A of the General Statutes relating to building inspection, or Part 6 of Article 19 of Chapter 160A relating to minimum housing standards, or Part 4 of Article 18 of Chapter 153A relating to building inspection, provide that upon the issuance of a complaint and notice of hearing or order pursuant thereto, a notice of lis pendens, with a copy of the complaint and notice of hearing or order attached thereto, may be filed in the office of the clerk of superior court of the county where the property is located. When a notice of lis pendens and a copy of the complaint and notice of hearing or order is filed with the clerk of superior court, it shall be indexed and cross-indexed in accordance with the indexing procedures of G.S. 1-117. From the date and time of indexing, the complaint and notice of hearing or order shall be binding upon the successors and assigns of the owners of and parties in interest in the building or dwelling. A copy of the notice of lis pendens shall be served upon the owners and parties in interest in the building or dwelling at the time of filing in accordance with G.S. 160A-428, 160A-445, or 153A-368 as applicable. The notice of lis pendens shall remain in full force and effect until cancelled. The ordinance may authorize the cancellation of the notice of lis pendens under certain circumstances. Upon receipt of notice from the city, the clerk of superior court shall cancel the notice of lis pendens. (1995, c. 158, s. 1.)

Editor's Note. — Session Laws 1995, c. 158, s. 5, made this section effective October 1, 1995, and provided that the act does not affect any notices or orders that were filed under any provisions repealed by the act.

SUBCHAPTER VI. PLEADINGS.

ARTICLE 15.

Answer.

§ 1-139. Burden of proof of contributory negligence.

CASE NOTES

Contributory Negligence Is a Jury Question. —

Whether plaintiff was contributorily negligent in voluntarily riding in a car driven by defendant when plaintiff knew or should have known that defendant was under the influence of intoxicating beverages was a question for the jury; therefore, judge's refusal to submit contributory negligence to the jury entitled defendant to a new trial. Jansen v. Collins, 92 N.C. App. 516, 374 S.E.2d 641 (1988).

Expert Testimony. — In a medical malpractice case, medical expert testimony, although useful, is not required to show the causal connection between plaintiff's alleged contributory negligence and his injuries. McGill v. French, 333 N.C. 209, 424 S.E.2d 108 (1993).

Evidence Held Sufficient. — In a medical malpractice case, the testimony of experts, as well as plaintiff's physician's testimony and other evidence indicating the condition of plaintiff's health, was sufficient evidence for a jury to find a causal connection between plaintiff's missing appointments and the spread or increased rate of the spread of his cancer so as to support its finding of contributory negligence. McGill v. French, 333 N.C. 209, 424 S.E.2d 108 (1993).

ARTICLE 18.

Amendments.

§ 1-166. Defendant sued in fictitious name; amendment.

CASE NOTES

This section is not a tolling statute; if it were the effect would be to preserve claims against "John Doe" defendants for some unlimited period of time or perhaps until some period after a plaintiff determines their true identity. This effect cannot have been intended by the legislature. Huggard v. Wake County Hosp. Sys., 102 N.C. App. 772, 403 S.E.2d 568 (1991), aff'd, 330 N.C. 610, 411 S.E.2d 610 (1992).

Amendment After Limitations Had Run. — Federal magistrate's order denying plaintiff's motion to amend complaint and substitute specific identifiable defendants for previously named "John Does," on grounds that the limitations period had run as to the newly identified defendants and had not been tolled under this section by the filing of a "John Doe" complaint, and that the relation back provisions of Rule 15(c), Fed. R. Civ. P., were not available, would be affirmed, as the federal district court believed that the North Carolina Supreme Court would most likely find that this section was not a tolling statute. Denny v. Hinton, 110 F.R.D. 434 (M.D.N.C. 1986), aff'd, 900 F.2d 251 (4th Cir. 1990).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-180.1. Judge not to comment on verdict.

Legal Periodicals. — For survey of 1983 law on criminal procedure, see 62 N.C.L. Rev. 1204 (1984).

§ 1-181. Requests for special instructions.

CASE NOTES

Judge Has Discretion, etc. —

Where a requested instruction is not submitted in writing and signed pursuant to this section it is within the discretion of the court to give or refuse such instruction. State v. Harris, 67 N.C. App.

97, 312 S.E.2d 541, appeal dismissed and cert. denied, 311 N.C. 307, 317 S.E.2d 905 (1984).

Applied in Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991).

Cited in State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986); Lusk v. Case, 94 N.C. App. 215, 379 S.E.2d 651 (1989).

SUBCHAPTER VIII. JUDGMENT.

Article 23.

Judgment.

§ 1-208.1. Judgment docket, judgment and docket book defined.

As used in this Chapter, unless the context clearly requires otherwise, the phrases "judgment docket", "judgment book", "docket book", and "judgment and docket book" include, without limitation, all records created or maintained by the clerk of superior court, pursuant to rules prescribed by the Director of the Administrative Office of the Courts pursuant to G.S. 7A-109, by the use of an electronic data entry system established by the Director pursuant to G.S. 7A-343. (1991, c. 167, s. 1.)

Editor's Note. — Session Laws 1991, c. 167, s. 2, made this section effective upon ratification. The act was ratified on May 30, 1991.

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

Cross References. — As to enforcement of judgments, and exemptions, see § 1C-1601 et seq.

CASE NOTES

II. Consent Judgments.

II. CONSENT JUDGMENTS.

A consent judgment may be set aside for lack of consent with respect to but one of the parties. Brundage v. Foye, 118 N.C. App. 138, 454 S.E.2d 669 (1995).

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.

CASE NOTES

Cited in Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984).

§ 1-229. Certified registered copy evidence.

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, — U.S. —, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

§ 1-230. In action for recovery of personal property.

Legal Periodicals. — For note, "Stolen Artwork: Deciding Ownership Is No Pretty Picture," see 1993 Duke L.J. 337.

§ 1-234. Where and how docketed; lien.

CASE NOTES

I. In General.
II. Creation of Lien.

I. IN GENERAL.

A judgment for taxes is a lien on all of the property owned by the judgment debtor in the county. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

Cited in Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

II. CREATION OF LIEN.

The mere rendition of a judgment will not constitute a lien. In accord with original. See Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Docketing Fixes the Lien. — A judgment lien in North Carolina is neither created nor perfected until it is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

No lien is created by a judgment until the judgment is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Date of Lien on Subsequently Acquired Real Property. — Under this section, a docketed judgment constitutes a lien on the real property owned by the debtor at the time of the docketing or which the debtor subsequently acquires within ten years from the date of the judgment. However, the general rule is that, with respect to property acquired after a judgment lien is docketed, the lien is created when the property is acquired, not when the judgment is docketed. Carter v. HCL Leasing Corp. (In re Martin), 87 Bankr. 394 (Bankr. E.D.N.C. 1988).

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, — U.S. —, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.

CASE NOTES

Cited in Pineville Real Estate Operation Corp. v. Michael, 32 F.3d 88 (4th Cir. 1994).

§ 1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor; judgment creditor to give notice of payment; entry of payment on docket; penalty for failure to give notice of payment.

(a) Payment of money judgment to clerk's office.

(1) The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment.

(2) The clerk shall give the party a receipt showing the date and amount of the payment and identifying the judgment, and shall note receipt of the payment on the judgment docket of the court. If the payment is made by check and the check is not finally paid by the drawee bank, the clerk shall cancel the notation of receipt and return the check to the party who tendered it.

(3) When a payment to the clerk is made in cash or when a check is finally paid by the drawee bank, the clerk shall give the notice provided for in subsection (b). When the full amount of a judgment has been so paid, the clerk shall include the words "JUDGMENT PAID IN FULL" in the notice.

(4) When a judgment has been paid in part, but not in full, the clerk shall furnish a certificate of partial payment to the clerk of superior court of any county to which a transcript of a judgment has been sent, but only upon the request of that clerk or of the party who made the partial payment.

(5) When a judgment has been paid in full, and the party in whose favor the judgment was rendered has collected all payments made to the clerk, or when ten days have passed since notice of payment in full was sent pursuant to subsection (b) and the party has neither collected all payments made to the clerk nor notified the clerk that the party disputes payment of the full amount of the judgment, then the clerk shall immediately:

(i) Mark "PAID AND SATISFIED IN FULL" on the judgment docket, and

(ii) Forward a certificate of payment in full to the clerk of superior court in each county to which a transcript of the judgment has been sent.

(6) If the party in whose favor a judgment has been rendered notifies the clerk that the party disputes payment in full of the judgment, the clerk shall proceed as provided in G.S. 1-242.

(7) Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court by any person other than the clerk shall be made in the presence of the clerk or his deputy, who shall witness the same.

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided, further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided further, that the attorney of record may waive said notice, and said moneys shall be paid by the clerk of superior court, by signing the judgment docket.

(c) Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered, and the clerk shall thereafter promptly enter the payment on the judgment docket of the court, and the clerk shall immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of the judgment has been sent, and the clerk of each superior court shall thereafter promptly enter the same on the judgment docket of the court and file the original with the judgment roll in the action. If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars ($100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure. (1823, c. 1212, P.R.; R.C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C.S., s. 617; 1967, c. 1067; 1969, c. 18; 1981, c. 745, s. 2; 1987, c. 497.)

CASE NOTES

Statements Filed Properly. — Where defendant's filing of statements was in accord with the instructions given by the judge and within the time period required by law, defendant acted properly and satisfied all legal obligations owed to plaintiffs with respect to the filing of notices regarding payments made by plaintiff. Everett v. Continental Bank, 845 F. Supp. 335 (M.D.N.C.), aff'd, 35 F.3d 555 (4th Cir. 1994).

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

Legal Periodicals. —

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For note, "Underinsured Motorist Coverage: North Carolina's Multiple Claimant Wrinkle — Ray v. Atlantic Casualty Insurance Co.," see 17 Campbell L. Rev. 147 (1995).

CASE NOTES

I. In General.
II. Scope of Article.
III. Actual Controversy Requirement.
IV. What May Be Determined by Declaratory Judgment.
  A. In General.
  B. Actions in Which Declaratory Judgment Held Available.
  C. Actions in Which Declaratory Judgment Held Unavailable.
V. Procedure.

I. IN GENERAL.

Purpose of Article. —

In accord with second paragraph in the original. See Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

In accord with third paragraph in the original. See Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), aff'd in part and rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

A declaratory judgment action is designed to provide an expeditious method of procuring a judicial interpretation of written instruments, such as wills, contracts, statutes, and insurance policies. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

The act requires liberal construction in favor of resolving uncertainties. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

The essential distinction, etc. —

The essential distinction between a declaratory judgment action and any other action for relief is that a declaratory judgment action may be maintained without actual wrong or loss as its basis. McCabe v. Dawkins, 97 N.C. App. 447, 388 S.E.2d 571, cert. denied, 326 N.C. 597, 393 S.E.2d 880 (1990).

Settlement of a declaratory judgment action to construe a will is not an election of remedies which would preclude one from suing attorney for negligent will drafting. McCabe v. Dawkins, 97 N.C. App. 447, 388 S.E.2d 571, cert. denied, 326 N.C. 597, 393 S.E.2d 880 (1990).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Unigard Mut. Ins. Co. v. Ingram, 71 N.C. App. 725, 323 S.E.2d 442 (1984); Newton v. Ohio Cas. Ins. Co., 91 N.C. App. 421, 371 S.E.2d 782 (1988); Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991); Majebe v. North Carolina Bd. of Medical Exmrs., 106 N.C. App. 253, 416 S.E.2d 404 (1992); Wendell v. Long, 107 N.C. App. 80, 418 S.E.2d 825 (1992).

Stated in City of Greensboro v. Reserve Ins. Co., 70 N.C. App. 651, 321

S.E.2d 232 (1984); Hales v. North Carolina Ins. Guar. Ass'n, 111 N.C. App. 892, 433 S.E.2d 468 (1993).

Cited in Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984); Southeast Airmotive Corp. v. United States Fire Ins. Co., 78 N.C. App. 418, 337 S.E.2d 167 (1985); Welsh v. Northern Telecom, Inc., 85 N.C. App. 281, 354 S.E.2d 746 (1987); Leonard v. Dillard, 87 N.C. App. 79, 359 S.E.2d 497 (1987); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); Knotville Fire Dep't, Inc. v. Wilkes County, 94 N.C. App. 377, 380 S.E.2d 422 (1989); Thornhill v. Riegg, 95 N.C. App. 532, 383 S.E.2d 447 (1989); Price v. Walker, 95 N.C. App. 712, 383 S.E.2d 686 (1989); FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989); Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990); American Motorists Ins. Co. v. Avnet, Inc., 98 N.C. App. 385, 391 S.E.2d 50 (1990); Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Mitchell v. Nationwide Ins. Co., 110 N.C. App. 16, 429 S.E.2d 351 (1993); Mitchell v. Nationwide Mut. Ins. Co., 335 N.C. 433, 439 S.E.2d 110 (1994); Homebuilders Ass'n v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994); Nationwide Mut. Ins. Co. v. Lankford, 118 N.C. App. 368, 455 S.E.2d 484 (1995).

II. SCOPE OF ARTICLE.

This Article does not license litigants to fish in judicial ponds, etc. —
In accord with original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Nor the Giving of Advisory Opinions. —
In accord with fourth paragraph in the original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

The Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property; for the trial court to find that conveyances are void as a matter of law is beyond the scope of the act. Town of Nags Head v. Tillett, 314 N.C. 627, 336 S.E.2d 394 (1985).

III. ACTUAL CONTROVERSY REQUIREMENT.

And the existence of a genuine, etc. —
In accord with the main volume. See State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

The charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization, but such a contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about legal rights and liabilities arising under the contract. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Parties cannot confer jurisdiction, etc. —
In accord with the main volume. See McLaughlin v. Martin, 92 N.C. App. 368, 374 S.E.2d 455 (1988).

Action for a declaratory judgment will lie, etc. —
In accord with first paragraph in original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

To constitute an actual, etc.
A mere threat to sue is not enough to establish an actual controversy. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

But Mere Apprehension, etc. —
Mere apprehension or the mere threat of an action or a suit is not enough. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

Mere threat of a suit is not enough to create jurisdiction for a declaratory judgment action. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Litigation Must Appear Unavoidable. —

In accord with first paragraph in original. See Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

It is not necessary that one party have an actual right of action against another, but there must be more than a mere disagreement. This means that it must be shown in the complaint that litigation appears unavoidable. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Practical Certainty of Litigation. — Where plaintiff hospitals sufficiently demonstrated a "practical certainty" that litigation would ensue, they presented an actual controversy justiciable under the Declaratory Judgment Act. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Litigation over the price at which the Department of Transportation must convey property to plaintiffs was unavoidable and, therefore, amounted to a justiciable controversy. Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

A Mere Difference of Opinion, etc. —

A mere difference of opinion between the parties does not constitute a controversy within the meaning of the Declaratory Judgment Act. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

An actual controversy is required to exist both at the time of the filing of the pleading and at the time of hearing. The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Genuine controversy must appear from the complaint and the record. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

Where the trial court concluded a case or controversy by finding respondent not mentally ill pursuant to this section, the trial court lacked jurisdiction to subsequently (six months later) declare nunc pro tunc that § 122C-3(21)(ii) was unconstitutional. In re Lynette H., 323 N.C. 598, 374 S.E.2d 272 (1988).

In an action to contest the constitutionality of § 14-225.1 under the Declaratory Judgment Act when his license to picket was voided, plaintiff was granted a temporary restraining order which allowed the picket to proceed; therefore, where it was over a year later when the lower court granted plaintiff's motion for summary judgment and over two years before the case was heard on appeal, the case was moot, both at the time it was before the lower court and on appeal; plaintiff had yet to be arrested or refused a permit for a similar demonstration, and the case did not fall under the exception "capable of repetition, yet evading review." Crumpler v. Thornburg, 92 N.C. App. 719, 375 S.E.2d 708, cert. denied, 324 N.C. 543, 380 S.E.2d 770 (1989).

A prospective defendant in an anticipated enforcement action by the State may not prelitigate its defenses and seek to determine the scope of prosecutorial discretion in a declaratory judgment action and request for injunction. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

Abuse of the Declaratory Judgment Act by prospective defendant in an anticipated enforcement action by the State under Chapter 75 in attempting to prelitigate its defenses and determine the scope of prosecutorial discretion constituted grounds for trial court's holding that the attorney violated § 1A-1, Rule 11 in signing and filing pleadings which were not warranted by existing law or a good faith argument for modification or reversal of existing law. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

A. In General.

And to Determine a Statute's Constitutionality. —

A party seeking to challenge the constitutionality of a section requiring a certificate of need to construct a hospital must bring an action pursuant to the

Declaratory Judgment Act. Hospital Group v. North Carolina Dep't of Human Resources, 76 N.C. App. 265, 332 S.E.2d 748 (1985).

A declaratory judgment action is a proper means of challenging the constitutionality of a statute which adversely affects the plaintiff. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

Construction and Coverage of Insurance Contracts. —

A question concerning the liability of an insurance company under its policy is generally a proper subject for a declaratory judgment, provided a genuine controversy exists between the parties. However, the cases in which a declaratory judgment has been found appropriate for determining the existence or extent of insurance coverage have involved situations in which legal action was pending, or judgment had been entered, against the insured. Ramsey v. Interstate Insurors, Inc., 89 N.C. App. 98, 365 S.E.2d 172, cert. denied, 322 N.C. 607, 370 S.E.2d 248 (1988).

B. Actions in Which Declaratory Judgment Held Available.

Challenge to Laws Giving County Power to Administer City Code. — The superior court had jurisdiction under the Declaratory Judgment Act to determine the validity of laws adopted by the General Assembly to provide that Craven County would administer building and safety codes inside the city limits of New Bern. City of New Bern v. New Bern-Craven County Bd. of Educ., 328 N.C. 557, 402 S.E.2d 623 (1991), aff'd, 113 N.C. App. 98, 437 S.E.2d 655 (1993).

Insurance Coverage. — A declaratory judgment action may be brought to determine whether coverage exists under an insurance policy. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Where exhaustion of the limits of tortfeasor's liability policy by payment of the limits of the policy by tortfeasor's insurer into deceased's estate triggered the applicability of plaintiff's underinsured motorist (UIM) coverage, refusal of decedent's insurer to state the extent of the UIM coverage under the two policies at issue sparked an actual controversy between plaintiff and insurer which provided the basis for a declaratory judgment suit. Smith v. Nationwide Mut. Ins. Co., 97 N.C. App. 363, 388 S.E.2d 624 (1990), rev'd on other grounds, 328 N.C. 139, 400 S.E.2d 44, rehearing denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Where plaintiff's insured was being sued on a claim for which it denied coverage and for which, if coverage existed, it had a duty to defend, a declaratory judgment action was proper. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Declaratory judgment actions are appropriate to interpret written instruments. LDDC, Inc. v. Pressley, 71 N.C. App. 431, 322 S.E.2d 416 (1984).

Construction of a Will. — Where plaintiff was not attacking the validity of a will but was asking the court to construe the will to determine who could take under the will, a civil action for construction of a will could be brought under this section. Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

Determination of Rights Under Zoning Ordinance. — It is fundamental under the Declaratory Judgment Act that a party who considers his rights to be affected by a zoning ordinance, in a situation where there can be no doubt that litigation involving him is imminent, does not have to wait to be sued, but that he may go to court, obtain a declaration of his rights under the ordinance and seek relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Validity of Covenant Not to Compete. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete, and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Action Against the Industrial Commission. — Plaintiff hospitals were entitled to seek declaratory and injunctive relief under the Declaratory Judgment Act in action against the Industrial Commission regarding payment of fees. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

C. Actions in Which Declaratory Judgment Held Unavailable.

Insurance Coverage. — Neither the allegation that third party might file a civil action against plaintiff insureds, nor the bare allegation, based upon information and belief, that third party had made claims for damages upon insurer established a genuine existing controversy. Unless and until an actual claim arising out of the accident in question was filed against plaintiffs or appeared unavoidable, their interest in the existence of insurance coverage for any such claim would be purely academic and the issue would not be ripe for determination by declaratory judgment. Ramsey v. Interstate Insurors, Inc., 89 N.C. App. 98, 365 S.E.2d 172, cert. denied, 322 N.C. 607, 370 S.E.2d 248 (1988).

Where complaint alleged nothing more than the possibility that plaintiff insurer might be responsible for excess coverage, and it was not evident from the complaint how much injury was sustained by the injured party, and where plaintiff did not even allege that it had been called upon to defend the action or participate in any way, plaintiff failed to allege sufficient facts to show the existence of an actual or justiciable controversy with regard to its insurance policy. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Under the uninsured motorist coverages of defendant insurers, liability did not attach until a valid judgment was obtained against the uninsured motorist; therefore, where plaintiffs had not obtained any such judgment and there was no assurance that they ever would, there was no case in controversy to meet the jurisdictional requirements for declaratory judgment under § 1-253. McLaughlin v. Martin, 92 N.C. App. 368, 374 S.E.2d 455 (1988).

Challenge to Zoning Ordinance Where Benefit Accepted. — Where plaintiff had clearly requested, obtained and accepted the benefits of a variance from a city ordinance, plaintiff was precluded from attacking the validity of the zoning ordinance in an action for declaratory judgment. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Fact that plaintiff remained subject to criminal contempt should he again fail to pay child support as required by an outstanding court order did not present a situation where litigation appeared unavoidable, but only presented the "mere threat of an action," and as such it was insufficient to create an actual controversy. Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990).

V. PROCEDURE.

The existence of an actual controversy must be shown in the complaint. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

A declaratory judgment action cannot be commenced by a motion in the cause, any more than can an action to modify or reform a consent judgment. Home Health & Hospice Care, Inc. v. Meyer, 88 N.C. App. 257, 362 S.E.2d 870 (1987).

When Motion to Dismiss Under Rule 12(b)(6), etc. —

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under § 1A-1, Rule 12(b)(6) will be granted. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

When Summary Judgment, etc.

In accord with the main volume. See Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986), aff'd, 811 F.2d 1505 (4th Cir. 1987).

The propriety of summary judgment in a declaratory judgment action is governed by the same considerations applicable to any other action and therefore summary judgment may be entered when there is no issue of material fact and a party is entitled to prevail as a matter of law. Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986), aff'd, 811 F.2d 1505 (4th Cir. 1987).

Venue. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone

Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Trial court's declaratory judgment need not be in any particular form, so long as it actually decides the issues in controversy. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

§ 1-254. Courts given power of construction of all instruments.

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

For note, "Underinsured Motorist Coverage: North Carolina's Multiple Claimant Wrinkle — Ray v. Atlantic Casualty Insurance Co.," see 17 Campbell L. Rev. 147 (1995).

CASE NOTES

This section establishes the right to seek declaratory judgments concerning the construction of contracts and written instruments. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Including Liability Insurance Policies. — This section makes a declaratory judgment proceeding available where there is a dispute concerning contracts of any kind, including liability insurance policies. Barnes v. Hardy, 98 N.C. App. 381, 390 S.E.2d 758 (1990), aff'd, 329 N.C. 690, 407 S.E.2d 504 (1991).

Insurance Coverage. — A declaratory judgment action may brought to determine whether coverage exists under an insurance policy. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Plaintiff's declaratory judgment action to have the rights and relations between the insured and insurers clarified was proper under this section. W & J Rives, Inc. v. Kemper Ins. Group, 92 N.C. App. 313, 374 S.E.2d 430 (1988), cert. denied, 324 N.C. 342, 378 S.E.2d 809 (1989).

Where plaintiff's insured was being sued on a claim for which it denied coverage and for which, if coverage existed, it had a duty to defend, a declaratory judgment action was proper. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

The Declaratory Judgment Act, etc. —

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), aff'd in part and rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

A suit to determine the validity of a city zoning ordinance, etc.

Plaintiffs, adjoining property owners, were well within their rights in electing to challenge an amendment to a zoning ordinance through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986).

Where plaintiff had clearly requested, obtained and accepted the benefits of a variance from a city ordinance, plaintiff was precluded from attacking the validity of the zoning ordinance through its complaint seeking declaratory judgment. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Covenant Not to Compete. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete, and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Questions as to the construction of a will may be brought in a declaratory judgment action; however, as there are limitations to the use of a declaratory judgment action, a caveat proceeding was appropriate to determine the validity of a document. Rogel v. Johnson, 114 N.C. App. 239, 441 S.E.2d 558, cert. denied, 336 N.C. 609, 447 S.E.2d 401 (1994).

Challenge brought by executor to validity of the stock transfers made pursuant to will to trustees was not a justiciable controversy in light of the transfer restrictions set out in the company's charter and on the stock certificates. Calton v. Calton, 118 N.C. App. 439, 456 S.E.2d 520 (1995).

It is not required for purposes of jurisdiction that plaintiff allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Standing to Challenge Act Requiring Town to Provide Beach Access. — A town had standing to challenge an act that provided that the town would be responsible for maintaining facilities for the provision of public pedestrian beach access. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

Individual plaintiffs, taxpayers and property owners in a town had standing to challenge an act that provides the town would be responsible for maintaining facilities for the provision of public pedestrian beach access, since it required the expenditure of public funds. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

Applied in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Quoted in Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); King v. Cranford, Whitaker & Dickens, 96 N.C. App. 245, 385 S.E.2d 357 (1989).

Cited in Kerhulas v. Trakas, 83 N.C. App. 414, 350 S.E.2d 169 (1986); Cardwell v. Smith, 92 N.C. App. 505, 374 S.E.2d 625 (1988); Townsend v. Harris, 102 N.C. App. 131, 401 S.E.2d 132 (1991); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Budd v. Davie County, 116 N.C. App. 168, 447 S.E.2d 449 (1994).

§ 1-255. Who may apply for a declaration.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) To determine the apportionment of the federal estate tax, interest and penalties under the provisions of Article 27 of Chapter 28A. (1931, c. 102, s. 3; 1985 (Reg. Sess., 1986), c. 878, s. 2.)

CASE NOTES

When parties have a genuine issue regarding rights and liabilities under a will, they are entitled to have them resolved; and where the trial court fails so to adjudicate, the cause will be remanded. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Court will not determine matters purely speculative. Sherrod v. Any Child or Children Hereafter Born to

Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Applied in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

§ 1-256. Enumeration of declarations not exclusive.

Legal Periodicals. —

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

§ 1-257. Discretion of court.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding; provided, however, that a controversy between insurance companies, arising either by direct action or by joinder or intervention, with respect to which of two or more of the insurers is liable under its particular policy and the insurers' respective liabilities and obligations, constitutes a justiciable issue and the court should, upon petition by one or more of the parties to the action, render a declaratory judgment as to the liabilities and obligations of the insurers. (1931, c. 102, s. 5; 1989, c. 183.)

Editor's Note. — Session Laws 1989, c. 183, which amended this section, was effective June 1, 1989, and was applicable to actions brought on or after that date.

§ 1-258. Review.

CASE NOTES

A declaratory judgment action is designed to establish in expeditious fashion the rights, duties and liabilities of parties in situations usually involving an issue of law or the construction of a document where the facts involved are largely undisputed. Its purpose is to settle uncertainty in regard to the rights and status of parties where there exists a real controversy of a justiciable nature. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

All orders, judgments and decrees in action for declaratory judgment may be reviewed as other orders, judgments and decrees. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

Declaratory judgment is appropriate for construction of insurance contracts and in determining the extent of coverage under an insurance policy. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

§ 1-259. Supplemental relief.

CASE NOTES

Supplemental Proceeding to Determine Liability Under Contract Held Proper. — Where fire department and the county entered into a contract which required the fire department to provide fire protection services for all property located within the district, a dispute arose between the parties as to whether a certain area was within fire department's district and fire department brought a declaratory judgment action to determine the boundaries of the district and the applicability of the contract to it, fire department could file a supplemental proceeding to determine country's liability under the contract for fire taxes collected on various properties within the disputed area for 1985 and prior years; that the declaratory judgment granted no retroactive relief to petitioner was immaterial, since retroactive relief was neither sought by the action nor denied by the judgment; furthermore, it was not legally significant that county's liability for past tax collections was not raised in the declaratory judgment action since none of the declaratory judgment statutes require one seeking an adjudgment of contract rights to go further and seek an enforcement of those rights. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 94 N.C. App. 377, 380 S.E.2d 422, cert. denied, 325 N.C. 432, 384 S.E.2d 538 (1989).

§ 1-260. Parties.

CASE NOTES

Interest of Administratrix. — Administratrix had more than an incidental or indirect interest in appeal from summary judgment particularly since it would be conclusive on the issue of coverage, and as a party to the action the appeal presented her sole opportunity to contest the court's decision. Nationwide Mut. Ins. Co. v. Anderson, 118 N.C. App. 92, 453 S.E.2d 542 (1995).

Applied in White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Quoted in King v. Cranford, Whitaker, & Dickens, 96 N.C. App. 245, 385 S.E.2d 357 (1989); Welling v. Walker, 117 N.C. App. 445, 451 S.E.2d 329 (1994), cert. granted, 339 N.C. 742, 454 S.E.2d 663 (1995).

§ 1-261. Jury trial.

CASE NOTES

Factual questions pursuant to this section can be determined by jury, and questions of law determined by the court. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Cited in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

CASE NOTES

Jurisdiction — Easement over Street from Highway to Edge of State-Owned Lake. — The district court had subject matter jurisdiction to determine the parties' rights in an easement over a street from a highway to the edge of a state-owned lake. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Same — Pier and Boat Ramp over

State-Owned Lake. — Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier and boat ramp extending over a state-owned lake rested in the Department of Natural Resources and Community Development (now the Department of Environment, Health and Natural Resources). As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

§ 1-263. Costs.

CASE NOTES

Applied in National Medical Enters., Inc. v. Sandrock, 72 N.C. App. 245, 324 S.E.2d 268 (1985); City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

§ 1-264. Liberal construction and administration.

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Jurisdiction Held Proper. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Applied in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

Cited in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

§ 1-267. Short title.

CASE NOTES

Cited in Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990).

SUBCHAPTER IX. APPEAL.

Article 27.

Appeal.

§ 1-269. Certiorari, recordari, and supersedeas.

CASE NOTES

- I. In General.
- II. Certiorari.
    - B. Grounds for Certiorari.
    - C. Application for Certiorari.

I. IN GENERAL.

The scope of judicial review of a decision made by a town board sitting as a quasi-judicial body must include: (1) Reviewing the record for errors in law, (2) insuring that the procedures specified by law in both statute and ordinance are followed, (3) insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses and inspect documents, (4) insuring that decisions of town board are supported by competent, material and substantial evidence in the whole record, and (5) insuring that decisions are not arbitrary and capricious. In re Walsh, 79 N.C. App. 611, 340 S.E.2d 497 (1986).

II. CERTIORARI.

B. Grounds for Certiorari.

Mandatory Suspension of Driving Privilege. — Petitioner whose driving privilege was mandatorily suspended under § 20-17(2) and § 20-19(e) did not have the right to appeal under § 20-25 or under Chapter 150B. However, the superior court could review the action of the Commissioner by issuing a writ of certiorari. Davis v. Hiatt, 326 N.C. 462, 390 S.E.2d 338 (1990).

C. Application for Certiorari.

Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

§ 1-271. Who may appeal.

CASE NOTES

I. In General.
II. Parties Held Entitled to Appeal.
III. Parties Held Not Entitled to Appeal.

I. IN GENERAL.

Only the party aggrieved may appeal, etc. —
In accord with first paragraph in the main volume. See Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Meaning of "Party Aggrieved". —
In accord with first paragraph in the main volume. See Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986); Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Aggrieved Party Qualified to Give Oral Notice of Appeal. — Where the jury announced its verdict in open court, it "rendered judgment" according to N.C.R.A.P., Rule 3(a) and § 1A-1, Rule 58, and oral notice of appeal was a proper procedure. As a party against whom the jury rendered the verdict, plaintiff was an "aggrieved party" who was entitled by law to orally appeal from the judgment; plaintiff's status as an aggrieved party qualified it to give oral notice of appeal, and its nonmovant status was irrelevant. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984).

Stated in Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991).

II. PARTIES HELD ENTITLED TO APPEAL.

A party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be. Casado v. Melas Corp., 69 N.C. App. 630, 318 S.E.2d 247 (1984).

Standing of Third-Party Defendant to Appeal. — Where third-party defendant not only had an opportunity to participate, but, in fact, did fully participate in the determination of third-party plaintiff's liability and was bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs, it was clearly an aggrieved party within the meaning of this section; therefore, third-party defendant had standing to appeal the judgment entered against third-party plaintiffs. Barker v. Agee, 326 N.C. 470, 389 S.E.2d 803 (1990).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

In a criminal action involving the possession of controlled substances, it was clear that the governmental agency attempting to appeal, the Department of Revenue, was not a party to the judgment ordering the forfeiture of a sum of money. Therefore, the Department had no right to appeal a forfeiture order contained in the judgment in the underlying criminal action. State v. Sneed, 112 N.C. App. 361, 435 S.E.2d 579 (1993).

Where plaintiff wife sought specific performance of part of separation agreement requiring defendant ex-husband to pay all of children's college costs, and the defendant asserted the defense that the consent judgment modified the terms of the separation agreement to require only that the defendant assist in the payment of college expenses, and the court found that the defendant was not in breach of the agreement as he had paid daughter's tuition, room and board so that the plaintiff was not entitled to the relief requested, the defendant had no right to appeal based on the trial court's additional conclusion that the consent order was without force and effect as to the terms regarding education contained in the separation agreement, as such conclusions would not be binding on any court in any future litigation concerning the separation agreement, and the defendant therefore was not an "aggrieved party" within the meaning of this section. Lennon v. Wahler, 84 N.C. App. 141, 351 S.E.2d 843 (1987).

Plaintiff, defendant's ex-husband, was not directly or injuriously affected by order appointing a guardian ad litem for defendant; his argument that future settlements or orders might later be disavowed by defendant on grounds that the appointment procedure was irregular was speculative and alleged at best a possible indirect injury to plaintiff's purported rights. Thus, because he was not an aggrieved party, plaintiff had no standing to challenge on appeal the order entered by the trial court. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Reduction pursuant to § 97-10.2. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to § 97-10.2 so as to permit her appeal from such recovery. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Attorney Appealing Fees Awarded to Her Client. — An attorney was not a party to an action brought on behalf of her client and therefore could not appeal on her own behalf the amount of attorney fees awarded her client. Seely v. Seely, 102 N.C. App. 572, 402 S.E.2d 870 (1991).

§ 1-272. Appeal from clerk to judge.

Except for appeals from judgments of the clerk of superior court in adoption proceedings, appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. Appeals from judgments of the clerk of superior court in adoption proceedings lie to the judge of the district court having jurisdiction, either in session or vacation. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within 10 days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C.C.P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C.S., s. 633; 1927, c. 15; 1971, c. 381, s. 12; 1995, c. 88, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, added "Except for appeals from judgments of the clerk of superior court in adoption proceedings" to the beginning of the section; added the second sentence; and deleted "superior" preceding "court" in the third sentence.

CASE NOTES

Applicability. —

The provisions of this section apply only to appeals from the clerk in proceedings in which the clerk has original jurisdiction; taxation of costs is not a proceeding in which the clerk has original jurisdiction. Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

Since this section gives the superior court jurisdiction to review the clerk's order in taxing costs on appeal, the parties could not, through the terms of purported settlement agreement, deprive the court of that jurisdiction. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Appeal of Probate Matters. —

Upon an appeal from an order of the clerk in a probate proceeding to remove an executor or administrator, the jurisdiction of the judge of superior court is derivative. Jurisdiction in these matters cannot be exercised by the judge of superior court except upon appeal. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

The appeal must be taken within 10 days, etc.

Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing on June 18, 1986, that he would deny the petition. The party aggrieved by the ruling, the petitioner, who was present and excepted to the order, had ten days thereafter to give notice of appeal pursuant to this section. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Applied in Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); State v. Edmondson, 316 S.E.2d 83 (N.C. 1984).

Cited in In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); Morley v. Morley, 102 N.C. App. 713, 403 S.E.2d 574 (1991); Williams v. Williams, 113 N.C. App. 226, 437 S.E.2d 884 (1994), aff'd, 339 N.C. 608, 453 S.E.2d 165 (1995).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

(a) Except as provided in subsection (b) of this section, if issues of law and of fact, or of fact only, are raised before the clerk, the clerk shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court.

(b) If issues of law and of fact, or of fact only, are raised before the clerk in adoption proceedings, then the clerk shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the district court. (C.C.P., c. 115; Code, s. 256; Rev., s. 588; C.S., s. 634; 1971, c. 381, s. 12; 1995, c. 88, s. 2.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, added the subsection (a) designation; in subsection (a) added "Except as provided in subsection

(b) of this section" to the beginning and substituted "the clerk" for "the" following the first occurrence of "the clerk"; and added subsection (b).

CASE NOTES

Transfer of Case Where Issues of Fact, etc. —

Where an issue of fact is raised in a special proceeding, it must be determined by the court. The clerk is directed by this section and § 1-399 to transfer the action to the superior court docket for trial of the issues raised in the pleadings. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Applied in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

Cited in Cummings v. Snyder, 91 N.C. App. 565, 372 S.E.2d 724 (1988).

§ 1-276. Judge determines entire controversy; may recommit.

CASE NOTES

I. In General.
II. Scope of Court's Jurisdiction and Authority.
III. Illustrative Cases.

I. IN GENERAL.

Section Not Applicable to Probate Proceedings. —

This section does not apply to probate matters. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983); In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

A proceeding to remove an executor is not a civil action or a special proceeding. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Civil actions and special proceedings, as contemplated by the terms of this section, which originate before the clerk of court are heard de novo when appealed to the Superior Court. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Stated in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

Cited in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

II. SCOPE OF COURT'S JURISDICTION AND AUTHORITY.

As If It Were Originally, etc. —

In cases that originate before the clerk and which are properly called "civil actions" or "special proceedings" as contemplated by the terms of this section, and when there is an appeal to superior court, the hearing is de novo in superior court. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

For discussion of reviewability on appeal of the exercise of the powers granted a clerk of superior court for revocation of letters of administration, see In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

III. ILLUSTRATIVE CASES.

Transfer of an action, seeking removal of a trustee, to civil issue docket by clerk of superior court was proper, where petitioner alleged breach of fiduciary duties by the trustee. Such an issue is a civil matter which is not "a part of" the administration of the estate, but rather "arises from" their administration. Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860, cert. denied, 323 N.C. 476, 373 S.E.2d 863 (1988).

Default Set Aside. — Where counsel for defendant failed to file responsive pleadings within the allowable time limit and there was no evidence in the record that defendant was anything less than diligent in its pursuit of this matter, nor any allegations that plaintiff was prejudiced by the five-day delay between the expiration of the filing period and the date defendant filed its motion and proposed answer, justice would best be served by setting aside the entry of default. Automotive Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 361 S.E.2d 895 (1987).

§ 1-277. Appeal from superior or district court judge.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

I. In General.
II. From What Decisions, etc., Appeal Lies.
  A. In General.
  B. Interlocutory Orders.
    1. In General.
    2. Substantial Right.
  C. Grant or Denial of New Trial.
  D. Jurisdiction.
  E. Injunctions.
  F. Costs.
V. Illustrative Cases.
  A. Appellant Held Entitled to Appeal.
    1. In General.
    2. Domestic Relations.
    3. Summary Judgment.
  B. Appellant Not Entitled to Appeal.
    1. In General.
    2. Pleading.
    3. Summary Judgment.
    4. Denial of Motion to Dismiss.

I. IN GENERAL.

Purpose of Section. —

The reason for the rules embodied in subsection (a) of this section and § 7A-27(d)(1) is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

Federal Requirements Distinguished. — The statutes setting forth the appeals process do not include the same jurisdictional "finality" requirement as does the federal statute. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

The right to appeal is available through two channels. Section 1A-1, Rule 54(b) allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of this section or § 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

No Appeal from Interlocutory Or-

der in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of § 15A-1444(d) and the decision in State v. Henry 318 N.C. 408, 348 S.E.2d 593 (1986), this section, the statutory basis for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam) and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972) is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals declined to follow State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, disc. rev. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987) insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or this section. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

"Substantial Right." — In deciding what constitutes a substantial right, it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues and where there is a possibility of inconsistent verdicts. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Applied in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354 (1984); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (1985); Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987); Kirkman v. Wilson, 86 N.C. App. 561, 358 S.E.2d 550 (1987); Automotive Restyling Concepts, Inc. v. Central Serv. Lincoln Mercury, Inc., 87 N.C. App. 173, 360 S.E.2d 141 (1987); Langley v. R.J. Reynolds Tobacco Co., 92 N.C. App. 327, 374 S.E.2d 443 (1988); Hooper v. C.M. Steel, Inc., 94 N.C. App. 567, 380 S.E.2d 593 (1989); Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989); Vinson v. Wallace, 96 N.C. App. 372, 385 S.E.2d 810 (1989); Looney v. Wilson, 97 N.C. App. 304, 388 S.E.2d 142 (1990); Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990); Combustion Sys. Sales v. Hatfield Heating & Air Conditioning Co., 102 N.C. App. 751, 403 S.E.2d 600 (1991); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); North Carolina DOT v. Davenport, 108 N.C. App. 178, 423 S.E.2d 327 (1992); Slade v. Vernon, 110 N.C. App. 422, 429 S.E.2d 744 (1993); Dillard v. USAir, Inc., 114 N.C. App. 791, 443 S.E.2d 80 (1994); Bowden v. Latta, 337 N.C. 794, 448 S.E.2d 503 (1994); Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

Quoted in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

Stated in Sanders v. George A. Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984); Bennish v. North Carolina Dance Theater, Inc., 108 N.C. App. 42, 422 S.E.2d 335 (1992); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Milner Airco, Inc. v. Morris, 111 N.C. App. 866, 433 S.E.2d 811 (1993).

Cited in Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983); Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985); Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985); Grant & Hastings, P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985);

City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986); Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986); County of Dare v. R.O. Givens Signs, Inc., 81 N.C. App. 526, 344 S.E.2d 324 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988); Atkins v. Mitchell, 91 N.C. App. 730, 373 S.E.2d 152 (1988); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988); Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75 (1989); Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989); Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990); Telerent Leasing Corp. v. Barbee, 102 N.C. App. 129, 401 S.E.2d 122 (1991); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991); Peoples Sav. & Loan Assoc. v. Citicorp Acceptance Co., 103 N.C. App. 762, 407 S.E.2d 251 (1991); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); McNeil v. Hicks, 111 N.C. App. 262, 431 S.E.2d 868 (1993); Retail Investors, Inc. v. Henzlik Inv. Co., 113 N.C. App. 549, 439 S.E.2d 196 (1994); Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167; Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

A. In General.

Editor's Note. *— All of the case notes which previously appeared in the main volume and cumulative supplements under analysis line II., From What Decisions, etc., Appeal Lies, have been reprinted below, along with annotations taken since the publication of the 1990 Cumulative Supplement. The reprinting of these case notes was necessary to accommodate new case note analyses.*

Right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. In re Estate of Reynolds, 221 N.C. 449, 20 S.E.2d 348 (1942).

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Denial of a motion for summary judgment based on the defense of res judicata may affect a substantial right, making the order immediately appealable. Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

When Immediate Right of Appeal Is Available. — This section gives any party to a lawsuit a right to an immediate appeal from every judicial determination which affects a substantial right of that party, or which constitutes a final adjudication, even when that determination disposes of only a part of the lawsuit. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

An order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

An appeal lies in all cases from judgment applying the law to the facts found. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899); Ladd v. Teague, 126 N.C. 544, 36 S.E. 45 (1900); Stokes v. Cogdell, 153 N.C. 181, 69 S.E. 65 (1910).

But No Appeal Lies to Review the Jury's Findings of Fact. — Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. Pender v. North State Life Ins. Co., 163 N.C. 98, 79 S.E. 293 (1913).

Cause of Action at Issue Must Be Directly Affected. — An appeal lies from an order or determination in an action which affects the right litigated, i.e., the cause of action in controversy therein, in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and which does not affect directly the cause of action litigated. Bynum v. Board of Comm'rs, 101 N.C. 412, 8 S.E. 136 (1888).

And Appellant's Substantial Rights Must Be Affected. — If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Substantial Right May Be Affected Despite Procedures for Staying Execution of Judgment. — The existence of the procedures under §§ 1-269, 1-289 and 1A-1, Rule 62 for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Except where statute otherwise expressly provides, appeal lies only from final judgment or one in its nature final. Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950). See also, Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

As a general rule, an appeal will not lie until there is a final disposition of the whole case. Moore v. Hinnant, 87 N.C. 505 (1882); Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885); Hailey v. Gray, 93 N.C. 195 (1885); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

All issues should be determined, and a final judgment rendered, before an appeal should be permitted. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

An appeal lies from a final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

A party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Right to avoid possibility of two trials on same issues can be a substantial right; this general proposition is based on following rationale: when common facts issues overlap claim appealed and any remaining claims have been adjudicated, the possibility is created that appellant will undergo second trial of same fact issues if appeal is eventually successful. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

The necessity of a second trial, standing alone, does not affect a substantial right. However, in certain cases the appellate courts have held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Nonfinal Orders and Judgments Are Not Generally Reviewable. — As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Unless the Right to Appeal Is Conferred by Statute. — Where the right to appeal is conferred by statute, i.e., where a substantial right of the parties would be affected if immediate appeal were not permitted under this section or § 7A-27, the judgment is appealable whether it is final or interlocutory in nature. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, 273 S.E.2d 298 (1980).

Finding under § 1A-1, Rule 54(b) Is Not Enough. — While the trial judge found that there was no reason for delay in obtaining appellate review, a trial judge cannot by denominating his decree a "final judgment" make it immediately appealable under § 1A-1, Rule 54(b) if it is not such a judgment. A finding that there is no just reason for delay under § 1A-1, Rule 54(b) is not enough. The judgment must also be final. Pelican Watch v. United States Fire Ins. Co., 90 N.C. App. 140, 367 S.E.2d 351 (1988), rev'd on other grounds, 323 N.C. 700, 375 S.E.2d 161 (1989).

What Is a Final Judgment. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Atkins v.

Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Decision Ending Proceedings Is Final. — Any decision, order or decree of the circuit court which puts an end to the proceedings between the parties to a cause in that court is final, and may be reviewed upon appeal. Ex parte Spencer, 95 N.C. 271 (1886); Bain v. Bain, 106 N.C. 239, 11 S.E. 327 (1890).

As Is Decision Disposing of One Branch of the Matter at Issue. — A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

The appellate court will not entertain premature or fragmentary appeals. Cape Fear & Y.V. Ry. v. King, 125 N.C. 454, 34 S.E. 541 (1899); Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920); Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921). See also, Joyner v. Reflector Co., 176 N.C. 274, 97 S.E. 44 (1918).

When No Substantial Right Is Jeopardized. — Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

Where no final judgment was given, nor any interlocutory order or determination that put an end to the proceeding or that could destroy or seriously impair some substantial right of the appellants should the appeal be delayed until final judgment, an appeal would not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N.C. 193 (1886); Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

When Appeal Is Premature. — Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 126 N.C. 62, 35 S.E. 185 (1900).

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N.C. 586, 71 S.E. 1087 (1911); Ingle v. McCurry, 243 N.C. 65, 89 S.E.2d 745 (1955).

The appellate court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916); Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

An order of the superior court remanding a case to the Industrial Commission is an interlocutory order, and an appeal therefrom to the appellate court is premature and is subject to dismissal. However, the appellate court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954).

As a Guide in Further Proceedings. — On dismissal of a fragmentary appeal, the appellate court may in its discretion express its opinion upon the merits, so far as it may be a guide in further proceedings in the court below. Penn-Allen Cement Co. v. Phillips, 182 N.C. 437, 109 S.E. 257 (1921).

And Its Opinion Will Be Authoritative on Subsequent Appeal. — Where appellate court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion would be authoritative on subsequent appeal. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918); North Carolina Pub. Serv. Co. v. Southern Power Co., 181 N.C. 356, 107 S.E. 226 (1921).

But agreement that other cases would abide determination in the case at hand was a matter between the parties, and does not authorize the appellate court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. Belden v. Snead, 84 N.C. 243 (1881).

An order compelling discovery is not a final judgment, nor does it affect a substantial right, and consequently, it is not appealable; however, when the order is enforced by sanctions pursuant to § 1A-1, Rule 37(b), the order is appealable as a final judgment. Walker v. Liberty Mut. Ins. Co., 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Where a party is adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable, since it affects a substantial right under this section and § 7A-27(d)(1). Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Trial court order holding that an administrative agency does not have subject matter jurisdiction over the issues on appeal is immediately appealable under subsection (a) of this section because it determines or discontinues the action. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

As to appeals involving orders of reference and referee's reports, see Vest v. Cooper, 68 N.C. 131 (1873); Sutton v. Schonwald, 80 N.C. 20 (1879); Sloan v. McMahon, 85 N.C. 296 (1881); Lutz v. Cline, 89 N.C. 186 (1883); Jones v. Call, 89 N.C. 188 (1883); Grant v. Reese, 90 N.C. 3 (1884); Braid v. Lukins, 95 N.C. 123 (1886); Leak v. Covington, 95 N.C. 193 (1886); Stevenson v. Felton, 99 N.C. 58, 5 S.E. 399 (1888); Wallace Bros. v. Douglas, 105 N.C. 42, 10 S.E. 1043 (1890); Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895); Royster v. Wright, 118 N.C. 152, 24 S.E. 746 (1896); Austin v. Stewart, 126 N.C. 525, 36 S.E. 37, appeal dismissed, 127 N.C. 580, 38 S.E. 1006 (1900); Jones v. Wooten, 137 N.C. 421, 49 S.E. 915 (1905); Duckworth v. Duckworth, 144 N.C. 620, 57 S.E. 396 (1907); Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909); Pritchard v. Panacea Spring Co., 151 N.C. 249, 65 S.E. 968 (1909); Pritchett v. Greensboro Supply Co., 153 N.C. 344, 69 S.E. 249 (1910); Smith v. Miller, 155 N.C. 242, 71 S.E. 353 (1911); John Church Co. v. Dawson, 157 N.C. 566, 72 S.E. 1009 (1911); International Waste Co. v. Bloomfield Mfg. Co., 168 N.C. 92, 83 S.E. 609 (1914); State ex rel. Marler-Dalton-Gilmer Co. v. Golden, 172 N.C. 823, 90 S.E. 909 (1916); Lewis v. May, 173 N.C. 100, 91 S.E. 691 (1917); Leroy v. Saliba, 182 N.C. 757, 108 S.E. 303 (1921); Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

As to appeals involving nonsuits prior to enactment of the Rules of Civil Procedure, § 1A-1, see Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880); Hedrick v. Pratt, 94 N.C. 101 (1886); Warner v. Western N.C.R.R., 94 N.C. 250 (1886); Davis v. Ely, 100 N.C. 283, 5 S.E. 239 (1888); Tiddy v. Harris, 101 N.C. 589, 8 S.E. 227 (1888); Hayes v. Railroad, 140 N.C. 131, 52 S.E. 416 (1905); Midgett v. Manufacturing Co., 140 N.C. 361, 53 S.E. 178 (1906); Morton v. Blades Lumber Co., 144 N.C. 31, 56 S.E. 551 (1907); White v. Harris, 166 N.C. 227, 81 S.E. 687 (1914); Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); Ridge v. Norfolk S.R.R., 167 N.C. 510, 83 S.E. 762 (1914); Quelch v. Futch, 172 N.C. 316, 90 S.E. 259 (1916); McKinney v. Patterson, 174 N.C. 483, 93 S.E. 967 (1917); Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921); Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921); Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921); City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957); Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

B. Interlocutory Orders.

1. In General.

What Orders Are Interlocutory. — An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to the final decree. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985).

In deciding whether an appeal is interlocutory, this section and § 7A-27 require a two-part test: (1) does the trial court's order affect a substantial right; and (2) if so, will the loss of that right injure the party appealing if it is not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Particular Facts and Procedural History Must Be Considered. — In determining which interlocutory orders are appealable and which are not, the Supreme Court must consider the particular facts of each case and the procedural history of the order from which an appeal is sought. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

An order denying the motion to amend a complaint is interlocutory, for it does not determine the entire controversy and requires further action by the trial court. Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985), rev'd on other grounds, 316 N.C. 67, 340 S.E.2d 397 (1986).

The refusal to grant permissive intervention is an interlocutory order. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Ruling striking attorney's charging lien was not a final order, since a charging lien is not available until there is a final judgment or decree to which the lien can attach, and no final judgment had yet been entered in the underlying divorce action. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Court's ruling on a separation-property settlement agreement did not dispose of plaintiff's claims for equitable distribution and alimony but only disposed of defendant's plea in bar to those claims; the court's ruling was thus interlocutory, and although the court's order stated that its ruling affected a substantial right and was a proper subject of immediate appeal, the court's order could not be certified as a final appealable order under § 1A-1, Rule 54(b). Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

The effect of an order denying the release of the funds held in escrow under § 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds were not to be released then, and did not purport to determine who was entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either 1A-1 Rule 54(b) or this section and § 7A-27(d). State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

An order setting aside a default judgment is interlocutory, as it does not finally dispose of the case and requires further action by the trial court. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Appeal of Order Denying Motion to Disqualify Law Firm Was Interlocutory. — Where defendant maintained that because law firm representing plaintiff represented defendant in previous matters of a similar nature (but not involving plaintiff), that firm could not represent plaintiff in the present matter, it did have a substantial right to prevent prior counsel from using confidential information gleaned from a prior representation and utilizing it against the client in subsequent litigation; however, it could not be found that the deprivation of this right would injure defendant if not corrected before a final judgment, and defendant's appeal of the trial court's order denying its motion to disqualify law firm was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Appeal of Order Denying Motion for Partial Summary Judgment Was Interlocutory. — Defendant's appeal of an order denying its motion for partial summary judgment on the issue of punitive damages was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

This section and § 7A-27, considered together, provide that no appeals lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before final judgment. State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

For discussion of apparent doctrinal inconsistency concerning the requirements for appealing interlocutory orders, which may produce irreconcilable results in cases which include counterclaims, see J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. Perry v. Tupper, 71 N.C. 380 (1874).

When Interlocutory Orders Are Appealable. — An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891); Warren v. Stancill, 117 N.C. 112, 23 S.E. 216 (1895). See Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error is not corrected at once, and before the final hearing, that an appeal lies before final judgment. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511,

183 S.E.2d 686 (1971); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

Appeals will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

Where an interlocutory order "affects a substantial right" of the party appealing or "in effect determines the action and prevents a judgment from which an appeal might be taken," the party has a right to appeal under this section or § 7A-27. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is immediately appealable. Webb v. Triad Appraisal & Adjustment Serv., Inc., 84 N.C. App. 446, 352 S.E.2d 859 (1987).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982); Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

For plaintiff to be entitled to appeal of right from an interlocutory order namely, granting defendant's motion for the appointment of a guardian ad litem, plaintiff was required to establish that it either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

An interlocutory order not appealable under Rule 54(b) of the Rules of Civil Procedure may nevertheless be appealed pursuant to this section and § 7A-27(d) which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Where the question to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the appellate court may determine the appeal on the merits even though the appeal is from an interlocutory order and is premature. Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

As to the purpose of the general rule against immediate appeal of interlocutory orders, see Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceeding. Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885).

When Appeal from Interlocutory Order Will Be Dismissed. — An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. Cole v. Farmers' Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950); Gardner v. Price, 239 N.C. 651, 80 S.E.2d 478 (1954); Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230

S.E.2d 181 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Interlocutory summary judgments in favor of third-party and fourth-party defendants in a negligence action were appealable as to the question of negligence, which presented common factual issues with the remaining claim of plaintiff against defendant, but not as to the issue of indemnity, which did not. Britt v. American Hoist & Derrick Co., 97 N.C. App. 442, 388 S.E.2d 613 (1990).

Reviewability of Nonappealable Interlocutory Orders on Appeal from Final Judgment. — A nonappealable interlocutory order which involves the merits and necessarily affects the judgment, is reviewable on appropriate exception upon an appeal from the final judgment in the cause. An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

If the appellant's rights would be fully and adequately protected by an exception to the order at issue, that could then be assigned as error on appeal after final judgment, there is no right to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

It is the appellant's burden to present appropriate grounds for the acceptance of an interlocutory appeal. Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 444 S.E.2d 252 (1994).

As to appeals involving demurrers prior to abolition of demurrer by § 1A-1, Rule 7(c), see State ex rel. Comm'rs of Wake County v. Magnin, 78 N.C. 181 (1878); Gay v. Brookshire, 82 N.C. 409 (1880); Bazemore v. Bridges, 105 N.C. 191, 10 S.E. 888 (1890); Walters v. Starness, 118 N.C. 842, 24 S.E. 713 (1896); Pender v. Maliett, 122 N.C. 163, 30 S.E. 324 (1898); Abbott v. Hancock, 123 N.C. 89, 31 S.E. 271 (1898); Morgan v. Harris, 141 N.C. 358, 54 S.E. 381 (1906); Shelby v. Charlotte Elec. Ry., Light & Power Co., 147 N.C. 537, 61 S.E. 377 (1908); Chambers v. Seaboard Air Line Ry., 172 N.C. 555, 90 S.E. 590 (1916); Headman v. Board of Comm'rs, 177 N.C. 261, 98 S.E. 776 (1919); Joyner v. Champion Fibre Co., 178 N.C. 634, 101 S.E. 373 (1919); Teal v. Liles, 183 N.C. 678, 111 S.E. 617 (1922); Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954); Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959); Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959); Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Housing Auth. v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965); Quick v. High Point Mem. Hosp., 269 N.C. 450, 152 S.E.2d 527 (1967); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967); Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

2. Substantial Right.

Section Prohibits Appeal of Interlocutory Orders Unless Substantial Right Is Affected. — This section and § 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976); Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

The effect of both this section and § 7A-27(d) is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. In accord with second paragraph in the 1992 Cumulative Supplement. See Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

This section serves as a roadblock to appeals from interlocutory orders which do not deprive appellant of a substantial right. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

An appeal does not lie to the appellate court from an interlocutory order of the superior court unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Shelby v. Lackey, 235 N.C. 343, 69 S.E.2d

607 (1952); Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Tucker v. State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230 S.E.2d 181 (1976); Citicorp Person-to-Person Fin. Center, Inc. v. Stallings 601 Sales, Inc., 49 N.C. App. 187, 270 S.E.2d 567 (1980); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

No appeal lies from an interlocutory order unless such ruling or order deprives an appellant of a "substantial right" which may be lost if appellate review is disallowed. Hopper v. Mason, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 558, 559 (1984).

No appeal lies from an interlocutory order or ruling of a trial judge unless the order or ruling deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before the final judgment. Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985); Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

No appeal lies from an interlocutory order unless it affects a substantial right and will result in injury if not reviewed before final judgment. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Although it is the general rule that no appeal lies from an interlocutory order, this section and § 7A-27(d) permit an immediate appeal from an interlocutory order which affects a substantial right. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

An interlocutory order is immediately appealable only when it affects a substantial right of the appellant. Helms v. Griffin, 64 N.C. App. 189, 306 S.E.2d 530 (1983).

An appeal from an interlocutory order will not be considered premature if it adversely affects a substantial right of the appellants. Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

This section and § 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

No appeal lies from an interlocutory order unless such order deprives an appellant of a substantial right and will result in injury if not reviewed prior to the final judgment. Pitt v. Williams, 101 N.C. App. 402, 399 S.E.2d 366 (1991).

"Substantial" Defined. — The word "substantial" is defined as "of real worth and importance; of considerable value, valuable." Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

The Supreme Court has adopted the definition of "substantial right" as: "A legal right affecting or involving a matter of substance as distinguished from matters of form: A right materially affecting those interests which a man is entitled to have preserved and protected by law: A material right." LaFalce v.

Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

In determining the appealability of interlocutory orders, a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

There has evolved a two-part test of the appealability of interlocutory orders under the "substantial right" exception provided in subsection (a) of this section and § 7A-27(d)(1). First, the right itself must be "substantial," and second, the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Interlocutory order "affects a substantial right" so that it is appealable under subsection (a) of this section and § 7A-27(d)(1) if right affected is "substantial" and right will "be lost, prejudiced, or be less than adequately protected" if order is not reviewed before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

The appealability of interlocutory orders pursuant to the "substantial right" exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. In accord with fourth paragraph in the 1992 Cumulative Supplement. See Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

In order to determine whether a substantial right will be affected by delaying an interlocutory appeal, the appellate court must examine each case by considering the particular facts of the case and the procedural context in which the order from which appeal is sought was entered. Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Substantial Rights Analysis in Criminal Appeals. — Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995).

Determination of Which Defendants Caused Damage. — Trial court's dismissal of plaintiffs' claims against aircraft manufacturer for, inter alia, negligence, breach of warranties, strict liability and infliction of emotional distress, affected a substantial right to have determined in a single proceeding, i.e., whether plaintiffs were damaged by the actions of one, some or all defendants, where their claims arose upon the same series of transactions. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Order Determining Only Issue of Liability. — A judgment which determines only that there has in fact been a breach by defendant and leaves unresolved the issue of plaintiffs' damage is clearly an interlocutory order; furthermore, an order determining only the issue of liability and leaving unresolved other issues such as that of damages cannot be held to "affect a substantial right". Johnston v. Royal Indem. Co., 107 N.C. App. 624, 421 S.E.2d 170 (1992).

Monetary Awards Affecting Substantial Right. — Although a money judgment may involve a substantial right, where jury awarded plaintiff $1.00 nominal damages, payment of the $1.00 would not potentially work injury to plaintiff if not corrected before appeal from the final judgment. Therefore, plaintiff did not have a statutory right to appeal pursuant to this section or § 7A-27. Donnelly v. Guilford County, 107 N.C. App. 289, 419 S.E.2d 365 (1992).

Arbitration Order. — An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Possibility of Inconsistent Verdicts. — Plaintiffs' appeal is reviewable under the substantial right exception where a dismissal would raise the possibility of inconsistent verdicts in later proceedings. Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Where dismissal of appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right was prejudiced; therefore, defendant's motion for summary judgment which was granted by the trial court was immediately appealable by plaintiff. Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 439 S.E.2d 787, cert. denied, 336 N.C. 780, 447 S.E.2d 422 (1994).

Avoidance of Rehearing or Trial Is Not a Substantial Right. — An interlocutory order which does not affect a "substantial right" of one of the parties under this section and § 7A-27(d) is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

Avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment, and the avoidance of trial is not a "substantial right" that would make such an interlocutory order appealable under this section or § 7A-27(d). Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984).

The mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a "substantial right." LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

Avoidance of a trial is not a substantial right entitling plaintiff to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Avoidance of a trial is not a substantial right. Subsection (b) of this statute, however, provides an exception to the general rule by allowing an "immediate appeal from the adverse ruling as to the jurisdiction of the court over the person." Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

But a party has a "substantial right" to avoid separate trials of the same legal issues. Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Simply having all claims determined in one proceeding is not a substantial right. A party has instead the substantial right to avoid two separate trials of the same "issues," but avoiding separate trials of different issues is not a substantial right. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

The right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under this section and § 7A-27(d). Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Partial Summary Judgment Granted. — The appellate court eliminated specifically the application of the doctrine of substantial rights to cases wherein partial summary judgment has been granted denying a claim for punitive damages. Moose v. Nissan of Statesville, Inc., 115 N.C. App. 423, 444 S.E.2d 694 (1994).

C. Grant or Denial of New Trial.

Application for New Trial Is Within Discretion of Trial Judge. — An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. Thomas v. Myers, 87 N.C. 31 (1882); Carson v. Dellinger, 90 N.C. 226 (1884).

And Is Not Reviewable Absent Abuse. — The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. Coats v. Norris, 180 N.C. 77, 104 S.E. 71 (1920); Harrill v. Seaboard Air Line Ry., 181 N.C. 315, 107 S.E. 136 (1921).

Appeal Only Lies as to Matters of Law. — An appeal from an order granting or refusing a new trial only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question whether or not a party to the action is entitled to a new trial as of right and as a matter of law. Braid v. Lukins, 95 N.C. 123 (1886).

The appellate court has jurisdiction to review, upon appeal, the decision of the court below granting or refusing to grant a new trial where a matter of law or legal inference is involved. Johnson v. Bell, 74 N.C. 355 (1876).

Order setting aside verdict as a matter of law is appealable. Tuthill v.

Norfolk S.R.R., 174 N.C. 77, 93 S.E. 446 (1917).

Grant of Partial New Trial. — The language in subsection (a) of this section which provides that an appeal may be taken from every judicial order or determination of a judge of a superior or district court which "grants or refuses a new trial" does not apply to an order which grants only a partial new trial. Unigard Carolina Ins. Co. v. Dickens, 41 N.C. App. 184, 254 S.E.2d 197 (1979).

An order granting a partial new trial is not immediately appealable, despite the language of subsection (a) of this section. LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable on appeal in the absence of manifest abuse. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

New Trial on Damage Issue. — Defendant may not appeal from an order directing a new trial solely on the issue of damages. Johnson v. Garwood, 49 N.C. App. 462, 271 S.E.2d 544 (1980).

Contents of Record When Grant or Denial of New Trial Is Appealed. — To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review or a matter of discretion which is not. Carson v. Dellinger, 90 N.C. 226 (1884).

D. Jurisdiction.

Purpose of Subsection (b). — Subsection (b) of this section simply allows a defendant, when the trial court has denied his motion to dismiss on the ground that the court lacked jurisdiction over the defendant, a means of immediate appellate determination as to whether the trial court has jurisdiction, so that it can then proceed to answer the questions raised by the lawsuit. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) was not enacted as a means of allowing litigants to seek advisory opinions from the appellate courts before necessary questions are resolved by the trial courts. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) Applies to Jurisdictional Power. — Subsection (b) of this section applies to the State's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. If the court has the jurisdictional power to require that the party defend, and the challenge is merely to the process or service used to bring the party before the court, subsection (b) does not apply. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982); Sigman v. R.R. Tydings, Inc., 59 N.C. App. 346, 296 S.E.2d 659 (1982).

The provision in subsection (b) of this section for immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant applies to the State's authority to bring a defendant before its courts, not to challenges to sufficiency of process and service. Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984).

And Is Limited to "Minimum Contacts" Questions. — The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under subsection (b) of this section, is limited to rulings on "minimum contacts" questions. To the extent that they are inconsistent with this interpretation, the decisions in Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462, cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1978); Kahan v. Lonzigiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), are overruled. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Allowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this State will never be forced to trial against their wishes. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Subsection (b) of this section allows immediate appeals concerning only "minimum contacts" questions: the question of whether the courts of this state have the authority to require defendant to defend the claim. This question involves a two-fold determination: whether the North Carolina statutes permit the courts of this jurisdiction to entertain this action against defendant, and, if so, whether this exercise of jurisdiction violates due process. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888 (1983).

The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under this statute, is limited to rulings on "minimum contacts" questions. Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

Appeal as to Personal Jurisdiction Lies at Any Stage. — An immediate appeal lies from an adverse ruling as to the personal, in rem or quasi in rem jurisdiction of the court at any stage of the proceedings. Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980).

Denial of the motion to dismiss for lack of in personam jurisdiction is immediately appealable. Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983).

An appeal from denial of a subsidiary motion, while the main motion is pending, would ordinarily be dismissed as interlocutory. Where the court expressly denies a subsidiary motion on the basis that it does not have authority to grant the relief sought in the main motion, such ruling is equivalent to a denial of the main motion. The order thus in effect determines the action, and is therefore immediately appealable. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

While § 1-278 provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, that section applies only to interlocutory orders that are not appealable; here, the order upholding the court's jurisdiction over the defendant was immediately appealable under the express provisions of subsection (b) of this section. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Although denial of a motion for summary judgment ordinarily is not appealable, an appeal will lie when the summary judgment motion is based on a challenge to personal jurisdiction. Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989).

But Substance and Not Form Controls. — Subsection (b) of this section allows interlocutory appeals only where the authority of the court to exercise jurisdiction over the person is contested. Merely making a motion to dismiss for lack of such jurisdiction will not ipso facto make an otherwise interlocutory order appealable, as substance, not form, controls. Poret v. State Personnel Comm'n, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 341 N.C. 117, 332 S.E.2d 491, 492 (1985).

Denial of a motion to dismiss for lack of jurisdiction over the person does not give rise to an automatic right of appeal, despite statutory language appearing to have such effect. Poret v. State Personnel Comm'n, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 314 N.C. 117, 332 S.E.2d 491, 492 (1985).

Determinations of Subject Matter Jurisdiction. — The denial of a motion to dismiss for lack of subject matter jurisdiction was properly appealable. North Carolina R.R. v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993), appeal dismissed, cert. denied, 336 N.C. 608, 447 S.E.2d 397 (1994).

Denial of Motions Challenging Personal and Subject Matter Jurisdiction Distinguished. — While subsection (b) of this section permits the immediate appeal of an order denying a motion made pursuant to § 1A-1, Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, it does not apply to orders denying motions made pursuant to § 1A-1, Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. Such orders, like other orders not determinative of an action, are interlocutory and therefore not immediately appealable. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Subsection (b) of this section has no application in the denial of a motion challenging "subject matter" jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Shaver v. N.C. Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981).

Sovereign Immunity. — Whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in this State. The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to § 1A-1, Rule 12(b)(1) is nonappealable, but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to § 1A-1, Rule 12(b)(2) is immediately appealable. Zimmer v. North

Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

Sovereign immunity is a matter of personal jurisdiction, not subject matter jurisdiction; therefore, the trial court's refusal to dismiss a suit against the state on these grounds is immediately appealable under this section. Colombo v. Dorrity, 115 N.C. App. 81, 443 S.E.2d 752, cert. denied, 337 N.C. 689, 448 S.E.2d 517 (1994).

Refusal to Dismiss Suit on Grounds of Governmental Immunity. — An immediate appeal lies under subsection (b) of this section from the trial court's refusal to dismiss a suit against the State on the grounds of governmental immunity. Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980); Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982), modified on other grounds, 309 N.C. 788, 309 S.E.2d 183 (1983).

Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a § 1A-1, Rule 12(b)(1) motion regarding subject matter jurisdiction or a § 1A-1, Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction is crucial in this State because subsection (b) of this section allows the immediate appeal of a denial of a § 1A-1, Rule 12(b)(2) motion but not the immediate appeal of a denial of a § 1A-1, Rule 12(b)(1) motion. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Where the defendants asserted governmental immunity from suit through the public duty doctrine, plaintiff's interlocutory appeal was therefore properly before the court. Clark v. Red Bird Cab Co., 114 N.C. App. 400, 442 S.E.2d 75 (1994).

E. Injunctions.

Appeal from Order Refusing Injunction. — A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First Nat'l Bank v. Jenkins, 64 N.C. 719 (1870).

Appeal from Order Continuing Injunction. — While the overruling of a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected, when an injunction has been issued an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. H.P. Reynolds & Co., 151 N.C. 606, 66 S.E. 657 (1910).

An appeal from an interlocutory order will not be considered premature if a substantial right of the appellant would be adversely affected by continuance of an injunction in effect pending final determination of the case. Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971); Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

An order granting or refusing a preliminary injunction is an interlocutory order governed by the requirements of this section. Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976).

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

When Grant of Preliminary Injunction Is Appealable. — The threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Appeal from an interlocutory injunction is not considered premature and will be entertained by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Scope of Review of Order Granting or Refusing Preliminary Injunction. — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, the Court of Appeals is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Defendant could appeal trial court's issuance of a preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff's zoning ordinance; although defendant's appeal was from an interlocutory order, defendant would have been deprived of a substantial right, the right to operate his business, absent a review prior to determination on the merits. Town of Knightdale v. Vaughn, 95 N.C. App. 649, 383 S.E.2d 460 (1989).

Dissolution of Restraining Order Involving Act Already Committed. — The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed. Wallace v. Town of N. Wilkesboro, 151 N.C. 614, 66 S.E. 657 (1910); Moore v. Cooper Monument Co., 166 N.C. 211, 81 S.E. 170 (1914); Kilpatrick v. Harvey, 170 N.C. 668, 86 S.E. 596 (1915); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

F. Costs.

Appeal Involving Only Costs Will Generally Be Dismissed. — An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. Martin v. Sloan, 69 N.C. 128 (1873); State v. Richmond & D.R.R., 74 N.C. 287 (1876); Hasty v. Funderburk, 89 N.C. 993 (1883); Russell v. Campbell, 112 N.C. 404, 17 S.E. 149 (1893).

Where, pending appeal, the subject matter of an action or the cause of action is destroyed, the appellate court will not consider the abstract question of which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

Unless a Substantial Right Is Involved. — If some important substantial right is involved, an exception will be made to the general rule that the appellate court will not decide a mere question of costs and an opinion will be given. Martin v. Sloan, 69 N.C. 128 (1873).

When Appeal Lies for Costs. — The appellate court will decide the question of costs when the very question at issue is the legality of a particular item of costs. Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

The appellate court will decide the question of costs where, taking the case below as properly decided, the issue is whether the costs of the lower court were adjudicated against the proper party. Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

Rulings Founded upon Lack of Power. — A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. Martin v. Bank of Fayetteville, 131 N.C. 121, 42 S.E. 558 (1902); Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, was appealable. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Denial of Motion to Retax Costs. — Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from the party taxed, or whether one or more items have been erroneously inserted in bills of costs. Van Dyke v. Aetna Life Ins. Co., 174 N.C. 78, 93 S.E. 444 (1917).

Order Staying Collection of Deposition Costs. — There was no right or injury to justify an immediate appeal from a discretionary order staying collection of deposition costs where the moving party had clearly expressed an intention to institute an action in which the same depositions would be material, and where the nonmoving party incurred those costs three months after filing responsive motions and over one month after taking an affidavit which revealed insufficiency of service of process, and then waited an additional six months for a hearing upon a motion to dismiss for insufficient service. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

Fiduciaries. — Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." May v. Darden, 83 N.C. 237 (1880).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

1. In General.

Editor's Note. *— All of the case notes which previously appeared in the main volume and cumulative supplements under analysis line V., Illustrative Cases, have been reprinted below, along with annotations taken since the publication of the 1990 Cumulative Supplement. The reprinting of these case notes was necessary to accommodate new case note analyses.*

When a motion on which an order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movant may appeal immediately and have his motion decided there on its merits. Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942).

An erroneous order denying party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

An order granting a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under subsection (a) of this section, because it determines or discontinues the action. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

If a motion to dismiss is allowed, plaintiff would have a right of immediate appeal, because further proceedings would be precluded by the order. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

Grant of motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Dismissal of Claim Against One Defendant. — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal was not premature. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

Factual Issue Central to Claim and Counterclaim. — In a suit for malicious prosecution in which defendant counterclaimed requesting a constructive trust, a factual issue of whether plaintiff forged defendant's name on a check was central to both actions; therefore, denial of appeal from summary judgment against defendant could have resulted in two juries in separate trials reaching different resolutions of this same issue if subsequent trial on the merits and appeal were successful. Consequently, the order dismissing defendant's counterclaim affected a substantial right and appeal was granted. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

Order Allowing Assertion of Counterclaims Only as Set-offs. — In an action arising out of a contract whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass, but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim, was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Grant of Jury Trial. — Where superior court's refusal to invalidate plaintiffs' demand for a jury trial in a stockholder's derivative action amounted to a ruling that plaintiffs were entitled to a jury trial, denial of defendants' motion to invalidate the demand was appealable. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987).

Order Requiring Jury Trial. — If an order denying a jury trial is appealable, an order requiring a jury trial should be appealable. If a denial of a jury trial affects a substantial right which would be lost absent a review prior to final determination, the requirement that a case will be tried by a jury should have the same effect. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987).

Preliminary injunction against defendant, pursuant to a covenant not to compete, was appealable prior to final determination on the merits, as it deprived defendant of a substantial right which he would lose absent review prior to a final determination. Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

Order Dismissing Charge of Indirect Civil Contempt. — An appeal would lie under subsection (a) of this section to review an order dismissing a charge of indirect civil contempt where the order affected a substantial right claimed by the appellant. Piedmont Equip. Co. v. Weant, 30 N.C. App. 191, 226 S.E.2d 688 (1976).

Order holding defendant in contempt of court for his failure to comply with discovery order was appealable and tested the validity both of the original discovery order and the contempt order. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

When Order for Discovery Appealable. — If the desired discovery would not have delayed trial or have caused the opposing party any reasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980).

Order Prohibiting Taking of Deposition of Plaintiff's Expert. — Where the order of the superior court prohibiting the taking of the deposition of the plaintiff's expert metallurgist by the defendant effectively precluded the defendant from introducing evidence of "readings" concerning the hardness of the metal obtained by the tests which the expert made, the order affected a substantial right of the defendant and was appealable. Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

In wrongful death action, the defendant declined to answer certain interrogatories on the grounds of self-incrimination, but was ordered to do so by the court and he appealed. Although this appeal was from an interlocutory order, it was nevertheless authorized, because if some of the interrogatories were incriminating and the defendant was compelled to answer them, his constitutional right could have been lost beyond recall and his appeal at the end of the trial would have been of no value. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Removal of Counsel. — Plaintiff had a substantial right to have attorney of her choice, properly admitted pro hac vice under § 84-4.1, represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

Removal of Public Officer. — An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office would be allowed by this section. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920).

An order appointing a next friend for plaintiff was an order affecting a substantial right from which plaintiff could appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968), rev'd on other grounds, 275 N.C. 90, 165 S.E.2d 490 (1969).

In an action seeking to quiet title to property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

Order Was Final Judgment Despite Reserving Issue for Jury. — Where the trial court in its order and partial summary judgment reserved for the jury the issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant's renewal of the lease, the order left no further action for the trial court to dispose of the case. Although the order reserved an issue for the jury, the trial court determined that it was irrelevant whether notice was received; therefore, there was no requirement for a trial on the issues of waiver or estoppel, and the order was effectively a final judgment and affected a substantial right. Janus Theatres of Burlington, Inc. v. Aragon, 104 N.C. App. 534, 410 S.E.2d 218 (1991).

An order requiring petitioners in

a boundary dispute to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition affected a substantial right and was appealable. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that proceeding, was an order affecting a substantial right of defendant, from which appeal would lie under this section. State ex rel. Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993).

Issue of Damages. — Although this section provides that an order granting a new trial solely as to the issue of damages is interlocutory, where the issue of damages was the only contested issue at trial, plaintiff could obtain immediate appellate review of the trial court's order. Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990).

Denial of Motion to Disqualify Counsel Not Immediately Appealable. — An order granting disqualification of counsel seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Where defendant moved to disqualify one of several law firms representing plaintiff because that firm had obtained confidential information during representation of defendant in a previous unrelated matter, denial of the motion was not immediately appealable. Defendant could adequately protect its right not to have its confidences used against it to its detriment by appealing any adverse final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

2. Domestic Relations.

Dismissal of Equitable Distribution Claim Was Appealable Order. — Where trial court's summary judgment did not determine wife's contract claim against husband's company, the court's dismissal of wife's equitable distribution claim was an appealable interlocutory order; given the factual issues overlapping the company's contract claim retained by the court and the equitable distribution counterclaim it dismissed, wife could appeal the dismissal of the equitable distribution counterclaim as a matter of right since a substantial right would otherwise be affected. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Order Barring Equitable Distribution. — Trial court's order denying defendant's motion to amend his answer in divorce action, which he filed following grant of absolute divorce to plaintiff, had the effect of forever barring defendant from asserting a claim for equitable distribution, and thus affected a substantial right; it was therefore appealable as a matter of right. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

As the court's judgment determined all matters pertaining to alimony and equitable distribution, the judgment was appealable under this section. Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Termination of Temporary Alimony. — Appeal of an order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, 85 N.C. App. 602, 355 S.E.2d 525, cert. denied, 320 N.C. 511, 358 S.E.2d 516 (1987).

Order Granting Claim for Alimony and Child Support. — An order granting a plaintiff-wife's claim for $4,225.00 in alimony and child-support arrearages and granting full faith and credit to a decree imposing a continuing support obligation affected a "substantial right" of defendant and was therefore reviewable by virtue of this section and § 7A-27(d), even though the trial court's order did not determine all the issues raised in the action. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Order which clearly affected the right of plaintiff to receive support on behalf of minor children from defendant on a monthly basis as needed and in the amount which had been found reasonably necessary for the support and maintenance of the children involved a substantial right, and therefore the order in question was immediately appealable. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Contempt Order in Child Custody Case Where Punishment Was Withheld. — Plaintiff was entitled to appeal the order of the trial court finding that she was in contempt of child custody orders even though the trial court withheld punishment and only made the findings a part of the record, since withholding punishment without further limitation retains the right to impose it in the future. Under such circumstances the order holding the plaintiff in contempt affected a substantial right and was therefore appealable. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Since the court's order constituted a final judgment as to alimony and equitable distribution, the order was immediately appealable. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371 (1995).

Interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights affected a substantial right and was immediately appealable. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

3. Summary Judgment.

Order Granting Partial Summary Judgment. — Where trial court's summary judgment determined fewer than all claims between parties, plaintiff could maintain interlocutory appeals from court's judgment; the trial court's dismissal of plaintiff's negligence, fraud and unfair trade practice claims against defendant insurance company and unfair trade claim against defendant insurance agency affected a substantial right since there were factual issues common to claims dismissed by the trial court and the negligence claim it did not dismiss. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Partial Summary Judgment Coupled with Mandatory Injunction. — While ordinarily the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable, where a mandatory injunction was part of the order for partial summary judgment, it clearly affected a "substantial right" of the defendant and the allowance of the motion for partial summary judgment was appealable. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Where defendants would immediately suffer the consequences of complying with the mandatory injunction order that they remove anchors and boat slips constructed on plaintiff's submerged lands, this affected a substantial right of defendants, giving them the right to appeal from the interlocutory order granting summary judgment for plaintiffs except on the issue of damages. Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980).

Where partial summary judgment included a mandatory injunction directing the defendant to remove a roadway, the Court of Appeals held that the order affected a substantial right of the defendant and was thus immediately appealable pursuant to this section and § 7A-27. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Order of partial summary judgment dismissing a punitive damages claim was appealable, though interlocutory, since claims for compensatory and punitive damages depended upon the same evidence and plaintiff's right to try them before the same jury and avoid the possible travesty of different juries rendering conflicting verdicts was a substantial one. Nance v. Robertson, 91 N.C. App. 121, 370 S.E.2d 283, cert. denied, 323 N.C. 477, 373 S.E.2d 865 (1988).

Partial Dismissal of Cause of Action. — Where the plaintiff alleged (1) breach of contract and fraud, (2) bad faith, and (3) unfair and deceptive trade practices, the plaintiff had a right to appeal the action of the trial court in striking portions of her cause of action as to bad faith and unfair trade practices; if the plaintiff's claims were not subject to dismissal, she had a substantial right to have all three causes tried at the same time by the same judge and jury, and the interlocutory order would work injury if not corrected before the final judgment. Webb v. Triad Appraisal & Adjustment Serv., Inc., 84 N.C. App. 446, 352 S.E.2d 859 (1987).

If summary judgment is allowed, the aggrieved party may have appellate review as a matter of right. Carr v.

Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981). See also, Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

There is a right of appeal under this section from an order granting summary judgment, notwithstanding the failure to meet the requirements for appeal under § 1A-1, Rule 54(b) where a substantial right is affected. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Order allowing summary judgment as to fewer than all defendants held to affect a substantial right. Federal Land Bank v. Lieben, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

Grant of Summary Judgment on Plaintiff's Claim. — Where defendants' defense to plaintiff's promissory note claim, as well as their counterclaims, were both founded on proving plaintiff's breach of a fiduciary relationship with defendants, defendants' substantial right to avoid separate trials of the same issue would be prejudiced absent immediate review of the trial court's grant of summary judgment on plaintiff's claim. Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Summary Judgment Dismissing Plaintiffs' Claims. — Where the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims, the trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it was immediately appealable under § 7A-27(d)(1) and subsection (a) of this section. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

The trial court's entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under this section and § 7A-27, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay" under § 1A-1, Rule 54(b). Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

In action by discharged employee seeking to recover accumulated vacation leave, a "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under § 1A-1, Rule 54(b) that "there was no just reason for delay." Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

Denial of Summary Judgment on Grounds of Sovereign and Qualified Immunity. — This section, in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Generally, the denial of summary judgment does not affect a substantial right and is not appealable. However, the denial of a motion for summary judgment on the grounds of sovereign and qualified immunity is immediately appealable. Herndon v. Barrett, 101 N.C. App. 636, 400 S.E.2d 767 (1991).

Denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992).

Defendant members of county board of commissioners and county appealed a trial court's denial of their motion for summary judgment, claiming they were entitled to immunity in libel case under the doctrine of governmental immunity. The order denying their motion was immediately appealable. Dickens v. Thorne, 110 N.C. App. 39, 429 S.E.2d 176 (1993).

B. Appellant Not Entitled to Appeal.

1. In General.

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of § 15A-1444(d) and the decision in State v. Henry, 318 N.C. 480, 348 S.E.2d 593 (1986), this section, the statutory basis for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam) and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972) is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the Court of Appeals has declined to follow State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, disc. rev. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987), insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or this section. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Denial of defendant's motion to dismiss, which was based on double jeopardy grounds, was an interlocutory order from which no appeal would lie in absence of statutory provision. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Ordinarily, no appeal will lie from an order permitting intervention of parties, unless the order adversely affects a substantial right which the appellant may lose if not granted on appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to § 1A-1, Rule 24(a) or as permissive intervention pursuant to § 1A-1, Rule 24(b). Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Refusal to Join Parties. — The addition of parties where they are not necessary is a matter within the trial court's discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. Henredon Furn. Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 697 (1976).

Joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Preliminary Injunction Upholding Covenant Not to Compete. — In an action for injunctive relief and damages based on alleged breach of a covenant not to compete, defendant's appeal of trial court's preliminary injunction barring him from participating in any employment that competed with plaintiff's business in certain geographic locations would be dismissed as interlocutory where there was no evidence in the record to show that defendant was presently working in any of those areas, as the injunction did not deprive defendant of any substantial right which he would lose absent a review prior to final determination. Automated Data Sys. v. Myers, 96 N.C. App. 624, 386 S.E.2d 432 (1989).

The appeal from a preliminary injunction restraining defendant bank from disposing of shares of corporate stock it held as executor under the will of a stockholder who died owning eighty-eight percent (88%) of the capital stock of a North Carolina corporation was unauthorized and was dismissed since fragmentary, piecemeal appeals from interlocutory orders are not usually permitted in this State; they are authorized only when it appears that a substantial right of the appellant will be lost if the order is not reviewed before the case has finally run its course in the trial court, and the preliminary injunction appealed from in this case was such an order, as its effect was temporary rather than permanent. Shuping v. NCNB Nat'l Bank, 93 N.C. App. 338, 377 S.E.2d 802 (1989).

Order Limiting Scope of Lis Pendens. — In an action to quiet title to property which defendants had incorporated into a residential subdivision, an order limiting the scope of the lis pendens filed by plaintiffs only to the area of the subdivision which they claimed was interlocutory and not immediately appealable. Whyburn v. Norwood, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. Godley Auction Co. v. Myers, 40 N.C.

App. 570, 253 S.E.2d 362 (1979).

Order to Post Secured Bond. — Where brothers were equal shareholders in company, company could no longer be conducted to the advantage of both of the shareholders, and the judge ordered the brothers to post a secured bond to ensure compliance with any judgment rendered, the appeal of the order by one of the brothers was interlocutory and was dismissed; no substantial right was affected since the amount of the bond reasonably approximated the value of the assets in the brother's possession, and the bond would be cancelled if the opposing sibling was unsuccessful in obtaining judgment in his favor. Stancil v. Stancil, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Order compelling arbitration was interlocutory and did not affect a substantial right. North Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

Orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980); Casey v. Grice, 60 N.C. App. 273, 298 S.E.2d 744 (1983).

Order with Regard to Interrogatories and Requested Admissions. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Order of the trial court that plaintiff not be required to answer certain interrogatories did not affect a substantial right of defendant where defendant had received answers to other interrogatories which gave it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy and the information denied to the defendant was not crucial to its defense. Starmount Co. v. City of Greensboro, 41 N.C. App. 591, 255 S.E.2d 267, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Order denying plaintiff's motion to reconsider an order denying attorney's motion for admission pro hac vice was an interlocutory order and was not immediately appealable; it did not come within the statutory appeals in subsection (a) or § 7A-27(d). Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Denial of attorneys' fees under § 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed, there had been no determination that his client, defendant, was entitled to alimony pendente lite under § 50-16.3, so that appellant was not yet entitled to attorneys' fees under § 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect his fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Dismissal of Treble Damage Claim. — A plaintiff in an Unfair Trade Practices action has no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75, cert. denied, 312 N.C. 85, 321 S.E.2d 898 (1984).

Denial of Motion to Dismiss Punitive Damages Claim. — An order denying defendant's motion to dismiss plaintiff's claim for punitive damages was not immediately appealable. Williams v. East Coast Sales, Inc., 50 N.C. App. 565, 274 S.E.2d 276 (1981).

The avoidance of having to affirmatively prove one's claim was not a "substantial" right, where plaintiff was affected by inability to immediately appeal an order setting aside a judgment only to the extent that it would have to establish defendants' liability and the amount thereof by proper evidence, rather than by relying upon a purported confession of judgment. First Am. Sav. & Loan Ass'n v. Satterfield, 87 N.C. App. 160, 359 S.E.2d 812 (1987).

Denial of a motion to strike an order vacating a default judgment does not affect a substantial right within the meaning of this section. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

An order by the trial court denying defendants' motions for judgment on special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as might be necessary to determine the rights of the parties, with leave to file amended pleadings, was not a final judgment. Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

An order setting aside default judgment did not affect a substantial right of plaintiffs, the avoidance of a full trial on the merits not being a substantial right in the case. Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Order withdrawing an upset bid could not have been appealed immediately, as it merely interrupted and delayed the foreclosure proceeding and had no ascertainable effect upon the appellants' rights, since the ordered resale could have ended with a bid of the same amount or even higher. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

Order to Allow Surveyor to Enter upon Land. — Interlocutory order by which defendants were simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property was not appealable. Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud did not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void was premature and would be dismissed. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Alimony, Child Support, and Attorneys' Fees Pendente Lite. — Husband's appeal of an order by the trial court in a divorce action for alimony pendente lite, child support pendente lite, and attorneys' fees pendente lite was premature and would be dismissed. Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to § 7A-27(d). Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981), overruling Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

An appeal from an order requiring resident father to have child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, who were separated but not divorced, was premature and would be dismissed, since the order was interlocutory and affected no substantial right. In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955).

Order to Submit to Psychiatric Examination in Custody Case. — An order that the parties and the child submit to a psychiatric examination prior to final determination on the question of custody was interlocutory and did not deprive plaintiff of a substantial right which she might lose if the order was not reviewed before a final determination of custody. Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

2. Pleading.

Appeal does not lie from denial of a motion for judgment on the pleadings. Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Denial of Motion to Strike Answer and Counterclaim. — An order which denies plaintiff's motion to strike defendant's answer and counterclaim does not affect a substantial right of plaintiff, nor does it in effect determine the action, and therefore no appeal lies from that order. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

Motions to Strike Allegations from Motion. — While the appellate court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

An order allowing amendment of a pleading is interlocutory and not appealable. O'Neill v. Southern Nat'l

Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

An order of the trial court allowing a motion to amend a complaint is interlocutory and is not immediately appealable. Barber v. Woodmen of World Life Ins. Soc'y, 88 N.C. App. 666, 364 S.E.2d 715 (1988).

Unless Substantial Rights Are Affected. — Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. George E. Nissen Co. v. Nissen, 198 N.C. 808, 153 S.E. 450 (1930).

Ruling on a Plea in Bar. — No substantial right of defendant would be lost or prejudiced by delaying his appeal from an adverse ruling to his plea in bar to plaintiff's complaint until the final judgment on plaintiff's equitable distribution and alimony claims; therefore, appeal of the trial court's interlocutory ruling on defendant's plea in bar as a matter of right was not permitted. Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

3. Summary Judgment.

Grant of Partial Summary Judgment on Issue of Liability. — An order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was not appealable. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979); Pelican Watch v. United States Fire Ins. Co., 323 N.C. 700, 375 S.E.2d 161 (1989).

Ordinarily, an order granting summary judgment on the issue of liability and reserving for trial the issue of damages is not immediately appealable. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Partial summary judgment holding that third party defendant must indemnify defendant for any judgment on plaintiff's claim was interlocutory and not appealable under this section or § 7A-27(d) since the judgment would not work injury to third party defendant if not corrected before appeal from a final judgment. Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980).

Generally, orders denying motions for summary judgment are not appealable. Hill v. Smith, 38 N.C. App. 625, 248 S.E.2d 455 (1978).

Ordinarily, denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

An order setting aside without prejudice a summary judgment on the grounds of procedural irregularity is interlocutory and not immediately appealable. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

Unless a Substantial Right Is Affected. — The denial of summary judgment is interlocutory in nature and not appealable under this section and § 7A-27, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

No Substantial Right Affected. — Where insurance company considered itself prejudiced by having the issue of insurance coverage heard before a jury which was also weighing the issue of liability, it nonetheless had other options or "remedies" available to it other than current consideration of its appeal, including severability of the issues or bifurcation of the trial; therefore, there was no "substantial interest" exception present to permit appeal under this section and § 7A-27 of the court's order denying defendant's summary judgment. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Grant of Summary Judgment Against Certain Defendants. — Appeal from the grant of summary judgment for a psychiatric hospital in a medical malpractice action against the hospital and independent contractor physicians was premature, where the remaining defendants had separate and distinct contracts and each owed a different duty to the patient. Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to § 1A-1, Rule 54(b), that there is "no just reason for delay," an appeal is premature unless the order allowing summary judgment affects a substantial right. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Summary Judgment on Dependent Claim. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Summary judgment on complaint was not appealable before counterclaim for attorneys' fees had been adjudicated by the trial court, since there was no possibility of inconsistent results in complaint and counterclaim; therefore, as parties did not address any other substantial right which could have been affected, no substantial right was involved which would have been "lost, prejudiced, or less than adequately protected" if court did not review appeal before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

4. Denial of Motion to Dismiss.

An appeal does not lie from refusal to dismiss an action. Winder v. Penniman, 181 N.C. 7, 105 S.E. 884 (1921); Capps v. Atlantic Coast Line R.R., 182 N.C. 758, 108 S.E. 300 (1921); City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939); Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971). See also, Mitchell v. Kilburn, 74 N.C. 483 (1876); Mitchell v. Hubbs, 74 N.C. 484 (1876); Mitchell v. West, 74 N.C. 485 (1876).

Refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957); Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980).

Ordinarily, there is no right of appeal from refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

While an appeal lies from the dismissal of an action or of an appeal from a justices' court, it does not lie from a refusal to dismiss; in such a case, an exception should be noted, and an appeal will lie from the final judgment. Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

The trial court's denial of defendant's motion to dismiss clearly represented an interlocutory order, which was not properly before the Court of Appeals. Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co., 90 N.C. App. 738, 370 S.E.2d 76 (1988).

Order Denying Motion to Dismiss for Lack of Subject Matter Jurisdiction Is Not Immediately Appealable. — While subsection (b) of this section provides that appeal does lie from denial of a motion to dismiss for lack of personal jurisdiction, this does not apply to the denial of a motion challenging subject matter jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Duke Univ. v. Bryant-Durham Elec. Co., 66 N.C. App. 726, 311 S.E.2d 638 (1984).

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of subsection (a) of this section, and it does not affect a substantial right, and is not appealable. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

An order denying a motion under § 1A-1, Rule 12(b)(6) is interlocutory and clearly not appealable. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

The trial court's refusal to allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to § 1A-1, Rule 12(b)(6) did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Denial of Motion to Dismiss for Failure to Join Necessary Party. — No substantial right of the defendant was impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party. The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be dismissed for that purpose. Defendant still had adequate opportunity in the trial court for a determination on the question of the joinder of parties.

Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

CASE NOTES

Application of Section. — While this section provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, this section applies only to interlocutory orders that are not appealable. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Trial court's order retaining jurisdiction to determine custody was interlocutory in nature. No substantial right of defendant was affected which could not be protected by timely appeal from trial court's ultimate disposition of the entire controversy on the merits. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Review of Intermediate Order Striking Upset Bid. — On appeal of resale of land being foreclosed, the Court of Appeals was not barred from considering the validity of the order withdrawing an upset bid and directing a resale of the foreclosed property merely because the appellants did not appeal from it within the time required by N.C.R.A.P., Rule 3, as this section permits the court, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale was such an order. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

§ 1-279: Repealed by Session Laws 1989, c. 377, s. 1, effective July 1, 1989.

Editor's Note. — Session Laws 1989, c. 377. s. 6, provided: "This act shall become effective July 1, 1989, and shall apply to all judgments of the district or superior court entered on or after that date."

§ 1-279.1. Manner and time for giving notice of appeal to appellate division in civil actions and in special proceedings.

Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure. (1989, c. 377, s. 2.)

Editor's Note. — Session Laws 1989, c. 377, s. 6, made this section effective July 1, 1989, and applicable to all judgments of the district or superior court entered on or after that date.

CASE NOTES

Editor's Note. — *Most of the cases below were decided under former § 1-279, which was repealed by Session Laws 1989, c. 377, s. 1.*

The provisions of former § 1-279 are jurisdictional. —

N.C.R.A.P., Rule 3(c) and subsection (c) of former § 1-279 are jurisdictional. First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

Failure to give timely notice of appeal in compliance with this section and N.C.R.A.P., Rule 3 is jurisdictional, and an untimely attempt to appeal must be

dismissed. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

The first indispensable step in appealing from a judgment or order is to give notice of appeal in the manner provided and within the time stated therein; where defendant did not take that first step, he lost his right to contest the validity of that order because the statutory requirements are jurisdictional. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Appeal from a judgment may be taken by giving oral notice of appeal at trial, but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Announcing of the court's decision in open court constitutes entry of judgment. —

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Oral Notice of Appeal Held Effective. — Where written judgment did not determine any issue different from those dealt with in judgment announced in open court, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under former § 1-279(a). Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Withdrawal of motion under § 1A-1, Rule 59 did not entitle defendants to 10 days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of N.C.R.A.P., Rule 3(c) and circumvent § 1A-1, Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Third paragraph of § 1A-1, Rule 58 held inapplicable. — Where the record affirmatively demonstrated that defendant did not give notice of appeal "within 30 days" after entry of order, the court had no jurisdiction to hear appeal; inasmuch as judge had announced his order in open court and directed counsel to prepare formal order, which the judge signed and entered on the same day, at the same session of court, the third paragraph of § 1A-1, Rule 58, which states that in cases where judgment is not rendered in open court, entry of judgment shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties, had no application. Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990).

Cross-notice of appeal filed by defendants on October 4, 1984 supported the trial court's finding that it was not defendants' intention to give notice of appeal at the September 1984 calendar call on their motion under § 1A-1, Rule 59. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

§ 1-283. Trial judge empowered to settle record on appeal; effect of leaving office or of disability.

CASE NOTES

Quoted in Von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

§ 1-285. Undertaking on appeal.

(a) To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in the sum of two hundred fifty dollars ($250.00), or any lesser sum as might be adjudged by the court, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal.

(b) The provisions of this section do not apply to the State of North Carolina, a city or county or a local board of education, an officer thereof in his official capacity, or an agency thereof. (C.C.P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C.S., s. 646; 1969, c. 44, s. 5; 1975, c. 391, s. 1; 1985, c. 468; 1987, c. 462, s. 2.)

Effect of Amendments. — The 1987 amendment, effective June 24, 1987, substituted "a city or a county or a local board of education, an officer thereof in his official capacity, or an agency thereof" for "or its agencies" at the end of subsection (b).

CASE NOTES

Secured Performance Bond Not Condition Precedent to Appeal. — An appeal must be dismissed when a party does not provide the appeal bond ordered by the trial judge. However, posting a "secured performance bond" is not a condition precedent to appeal under statute or appellate rules. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

Cited in Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

§ 1-286. Justification of sureties.

CASE NOTES

Stated in Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987).

§ 1-288. Appeals by indigents; clerk's fees.

When any party to a civil action tried and determined in the superior or district court at the time of trial or special proceeding desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of poverty, to make the deposit or to give the security required by law for the appeal, it shall be the duty of the judge or clerk of said court to make an order allowing the party to appeal from the judgment to the Appellate Division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment or order in a civil action or special proceeding shall, within 30 days after the entry of the judgment or order, make affidavit that he or she is unable by reason of poverty to give the security required by law. Nothing contained in this section deprives the clerk of the superior court of the right to demand the fees for the certificate and seal as now allowed by law in such cases. Provided, that where the judge or the clerk has made an order allowing the appellant to appeal as an indigent and the appeal has been filed in the Appellate Division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C.S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8; 1971, c. 268, s. 12; 1991, c. 563, s. 1; 1993, c. 435, s. 3; 1995, c. 536, s. 1.)

Editor's Note. — Session Laws 1991, c. 563, s. 1, which amended this section, was effective October 1, 1991, and was applicable to all appeals in forma pauperis from a judgment or order entered on or after October 1, 1991.

Session Laws 1993, c. 435, s. 3, was effective October 1, 1993, and was applicable to all suits or appeals prosecuted on or after that date.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to all appeals by indigents from a judgment or order entered on or after that date, deleted "and that he or she is advised by a practicing attorney that there is error in a matter of law in the decision of the court in the action" from the end of the third sentence; and deleted the former fourth sentence regarding affidavits and written statement that the decision of the court was contrary to law.

CASE NOTES

Editor's Note. — *The cases below were decided under this section as it read prior to the 1993 amendment, which formerly provided for appeals as a pauper.*

This section is applicable, etc. —

Appeals in forma pauperis from juvenile actions tried in district court are governed by the provisions of this section, the requirements of which are mandatory and must be observed. Failure to comply with these requirements deprives the appellate court of any jurisdiction. In re Shields, 68 N.C. App. 561, 315 S.E.2d 797 (1984).

The requirements of this section are mandatory, etc. —

The provisions of this section are mandatory and jurisdictional, and the purported appeal is subject to dismissal where affidavits are not filed within 10 days from the expiration of the session of court, as required by this section. Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

The requirement of this section that motions to appeal in forma pauperis be made at the latest 10 days after the expiration of the session at which judgment is rendered is mandatory. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Trial de Novo of Small Claims Action. — Plaintiff or defendant may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Ownership of House. — District judge erred in entering order denying petition to appear in forma pauperis of defendant who owned a home valued at $27,150 and other unencumbered personal property in view of abundant evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness and unreasonable of selling her house. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

The late filing of appeal entries had no bearing on the question of this section's requirement that a motion to appeal in forma pauperis be made within 10 days after the expiration of the session at which judgment is rendered (now 30 days after entry of the judgment or order); appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Proceeding as a pauper under this section may be a great deal more expensive and burdensome than proceeding as a prepaid appellant. Moreover, a prepaid appellant is free to urge upon the court a change in the law, a position apparently not open to an indigent proceeding under this section. Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), cert. denied, 472 U.S. 1019, 105 S. Ct. 3484, 87 L. Ed. 2d 619 (1985).

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

Cited in In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

§ 1-289. Undertaking to stay execution on money judgment.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

Cited in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

§ 1-292. How judgment for real property stayed.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

The general rule is that once an appeal is perfected, the lower court is divested of jurisdiction, but the lower court nonetheless retains jurisdiction to take action which aids the appeal, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

And Operates as a Stay, etc. —

The language of this section is clear. An appeal stays further proceedings in the lower court upon the judgment appealed and matters embraced within that judgment. Jenkins v. Wheeler, 72 N.C. App. 363, 325 S.E.2d 4 (1985).

Relation Back of Perfection of Appeal. —

While an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction. Swilling v. Swilling, 329 N.C. 219, 404 S.E.2d 837 (1991).

Authority of Trial Court to Make Findings and Conclusions. — Pursuant to the provisions of § 1A-1, Rule 58, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority. Hightower v. Hightower, 85 N.C. App. 333, 354 S.E.2d 743, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

The stay under this section does not prevent the trial court from approving the form of its judgment and making those findings and conclusions necessary to prepare and file its judgment under § 1A-1, Rule 58. Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Trial Court Has Jurisdiction to Enforce Alimony Order During Appeal. — Trial court did not lack authority to enter contempt order and initial show cause order against defendant where defendant had appealed original order for periodic alimony payments; appeal did not remove jurisdiction of trial court under this section since § 50-16.7 dictates that trial court has jurisdiction to enforce alimony order during appeal. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Court Without Authority to Modify Custody Pending Appeal of Visitation Order. — Under both statute and case law, the district court lost jurisdiction over all custody matters when defendant appealed its visitation order. Thus, while defendant's appeal was pending, the district court lacked the authority to modify its prior custody award, and also lacked the authority to find defendant in contempt for failing to comply with such order. Hackworth v. Hackworth, 87 N.C. App. 284, 360 S.E.2d 472 (1987).

Applied in Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985); Bullock v. Newman, 93 N.C. App. 545, 378 S.E.2d 562 (1989); Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993).

Quoted in Lowder v. All Star Mills, Inc., 100 N.C. App. 318, 396 S.E.2d 92 (1990).

Stated in Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993).

Cited in Oshita v. Hill, 65 N.C. App. 326, 308 S.E.2d 923 (1983); Corbett v. Corbett, 67 N.C. App. 754, 313 S.E.2d 888 (1984); Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488 (1989); Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

§ 1-296. Judgment not vacated by stay.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

§ 1-298. Procedure after determination of appeal.

CASE NOTES

The certified appellate decision is sent to the trial court which must then direct the execution thereof to proceed. Severance v. Ford Motor Co., 105 N.C. App. 98, 411 S.E.2d 618, cert. denied, 331 N.C. 286, 417 S.E.2d 255 (1992).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-302. Judgment enforced by execution.

Cross References. — As to enforcement of judgments, and exemptions, see § 1C-1601 et seq.

§ 1-307. Issued from and returned to court of rendition.

CASE NOTES

Venue of a proceeding in the nature of a creditor's supplemental proceeding under this section, in which in order to issue an execution on the defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by this section, not § 28A-3-1. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

§ 1-310. When dated and returnable.

CASE NOTES

Cited in HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992); In re Pinner, 146 Bankr. 659 (Bankr. E.D.N.C. 1992).

§ 1-311. Against the person.

CASE NOTES

In order for defendant to invoke his privilege against self-incrimination, there must be a threat of execution against the person. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

When Execution Against Person of Judgment Debtor May Issue. —

In accord with second paragraph in the main volume. See Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

In 1977, the legislature amended this section, limiting execution against the person to cases where either the jury's verdict or the trial court's findings of fact include a finding that defendant is about to either (1) flee the jurisdiction to avoid paying creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Limitations of Execution Against a Person. — Due to an amendment of this section in 1977, execution against a person under this statute is limited to cases where either the jury's verdict or the trial court's findings of fact include a finding that the defendant is about to either (1) flee the jurisdiction to avoid paying his creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained. And where there was no such finding, defendant had no basis to exercise his privilege against self-incrimination because of the threat of a punitive damages award. MacClements v.

LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

Defendant's Privilege Against Self-Incrimination Inapplicable, etc. —

In a wrongful death action, the defendant faced no peril being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings under this section for execution against the person. Therefore, there was no basis for the defendant declining to answer interrogatories on the grounds of self-incrimination. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Award of Punitive Damages in Cause Under § 1-410 Not Sufficient. — Under the present language of this section, an award of punitive damages in a cause of action specified under § 1-410, alone, does not give rise to an execution against the person. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Applied in Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 323 S.E.2d 506 (1984).

§ 1-313. Form of execution.

The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(1) Against Property — No Lien on Personal Property until Levy. — If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

(2) Against Property in Hands of Personal Representative. — If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

(3) Against the Person. — If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is released or discharged according to law. The execution shall include a statement that if the defendant is an indigent person he is entitled to services of counsel, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release,

and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer.

(4) For Delivery of Specific Property. — If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(5) For Purchase Money of Land. — If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C.C.P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C.S., s. 675; 1971, c. 653, s. 2; 1977, c. 649, s. 2.)

Editor's Note. — This section is set out above to correct an error in subdivision (4) as it appears in the main volume.

CASE NOTES

Liens on Real Estate, etc. — There is no lien on personal property in North Carolina until levy. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Forcible Entry to Execute Process on Personalty. — An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

While it is true that § 1-480 permits forcible entry where property subject to claim and delivery is concealed, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to subdivision (4) of this section. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

Quoted in Halverson v. Halverson, 151 Bankr. 358 (M.D.N.C. 1993).

§ 1-315. Property liable to sale under execution; bill of sale.

CASE NOTES

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.

CASE NOTES

Cited in Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

§ 1-324.5. Violations of three preceding sections misdemeanor.

If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a Class 1 misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C.S., s. 1205; 1955, c. 1371, s. 2; 1993, c. 539, s. 1; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale

a. Contained in a mortgage, deed of trust, or conditional sale contract, or
b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or

(2) A resale ordered with respect to any sale described in subsection (a)(1), where such original sale was not held under a court order, or
(3) An execution sale, or
(4) A sale ordered in a criminal action, or
(5) A tax foreclosure sale, or
(6) A sale made pursuant to Article 15 of Chapter 35A of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or
(7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or
(8) A sale made in the course of liquidation of an insurance company pursuant to Article 17A of Chapter 58 of the General Statutes, or
(8a) A lease, sale, or exchange made pursuant to G.S. 35A-1251(17) or G.S. 35A-1252(14), unless any order thereunder requires, or
(9) Any other sale the procedure for which is specially provided by any statute other than this Article.

(b) As hereafter used in this Article, "sale" means a judicial sale. (1949, c. 719, s. 1; 1971, c. 268, s. 16; 1987, c. 550, s. 12; 1989, c. 473, s. 10.)

Cross References. — As to enforcement of judgments, and exemptions, see § 1C-1601 et seq.

Editor's Note. — Much of Article 17A of Chapter 58, referred to in this section, was repealed by Session Laws 1989, c. 452, which also enacted an Article 46 of Chapter 58, containing similar provisions to those contained in the repealed sections of Article 17A. Article 46 of Chapter 58 has been recodified as Article 30 of Chapter 58.

CASE NOTES

This Article and § 45-21.1 et seq. Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to this Article or, if expressly provided in the deed or mortgage, by power of sale under § 45-21.1 et seq. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Stated in United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

§ 1-339.4. Who may hold sale.

An order of sale may authorize the persons designated below to hold the sale:

(1) In any proceeding, a commissioner specially appointed therefor; or
(2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;
(3) In a proceeding to sell property of a minor, the guardian of such minor's estate;

(4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;

(5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;

(6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;

(7) In a receivership proceeding, the receiver;

(8) In a proceeding to sell property of a trust, the trustee. (1949, c. 719, s. 1; 1993, c. 377, s. 2.)

Editor's Note. — Session Laws 1993, c. 377, s. 2, which added subdivision (8), was effective December 1, 1993, and was applicable to all trusts in existence on December 1, 1993 or created on or after December 1, 1993.

§ 1-339.10. Bond of person holding sale.

(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and

(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor or trustee of a testamentary trust is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor or trustee of a testamentary trust, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bonds shall be payable to the State of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1993, c. 377, s. 3.)

Editor's Note. — Session Laws 1993, c. 377, s. 3, which amended subsection (c), was effective December 1, 1993, and was applicable to all trusts in existence on December 1, 1993 or created on or after that date.

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.15. Public sale; contents of notice of sale.

CASE NOTES

Cited in Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987).

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.

CASE NOTES

Cited in Yates ex rel. Henderson v. J.W. Campbell Elec. Corp., 95 N.C. App. 354, 382 S.E.2d 860 (1989).

§ 1-339.25. Public sale; upset bid on real property; compliance bond.

CASE NOTES

Advance Bid Held Not to Meet Requirements of Section. —

Superior court did not err in confirming the private sale to earlier bidder, and it properly exercised its discretion by not considering the later bid; neither later bidder's deposit with estate attorney nor estate attorney's telephone notice to the clerk amounted to an upset bid because it was not a timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it was applicable. In re Estate of Kessinger, 94 N.C. App. 191, 379 S.E.2d 662 (1989).

Requiring Cash Bond in Full Amount of Bid Inhibits Maximum Bid Policy. — The general policy of the law favors maximum bidding at judicial sales; and requiring a cash bond in the full amount of the bid, rather than the 5% or so usually deposited under subsection (a) of this section, obviously tends to inhibit bidding when a substantial amount has already been bid. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

Discretionary Power of Clerk to Require Cash Bond of Highest Bidder. — Implicit in the authority that subsection (c) of this section gives clerks of the superior court to require the highest bidder at a resale of property to deposit a cash bond is the requirement that there be some justifiable basis for such an order; otherwise, the discretionary power that the statute gives clerks in such matters would be unbridled and subject to neither legal review nor remedy. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.

CASE NOTES

Applied in In re Estate of Kessinger, 94 N.C. App. 191, 379 S.E.2d 662 (1989).

§ 1-339.28. Public sale; confirmation of sale.

CASE NOTES

Subdivision (a)(3) gives the clerk of court original jurisdiction over public sales ordered by such clerk. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied and appeal dismissed, 310 N.C. 476, 312 S.E.2d 882 (1984).

Cited in In re Estate of Kessinger, 94 N.C. App. 191, 379 S.E.2d 662 (1989); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

§ 1-339.29. Public sale; real property; deed; order for possession.

(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

(1) The authority for making the sale,
(2) The title of the action or proceeding in which the sale was had,
(3) The name of the person authorized to make the sale,
(4) The fact that the sale was duly advertised,
(5) The date of the sale,
(6) The name of the highest bidder and the price bid,
(7) That the sale has been confirmed,
(8) That the terms of the sale have been complied with, and
(9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding.

(d) An order for possession granted pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1987, c. 627, s. 1.)

Editor's Note. — Session Laws 1987, which added subsection (d), was effective July 16, 1987, and was applicable to all orders of possession granted or issued after that date.

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.

CASE NOTES

Prejudgment Interest on Bid. — Executor, after a series of resales arising from defendant's failure to comply with his bid at a judicial sale under this section, was entitled to prejudgment interest on defendant's full $125,000.00 bid. Parker v. Lippard, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Award of Attorneys' Fees Held Improper. — Given the statute's apparent purpose to assess a defaulting bidder with resale "expenses," defendant's liability for "costs of resale" under subsection (e) did not entitle the court to award the executor attorneys' fees incurred after defendant's default. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified and aff'd on rehearing, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Article 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

Cross References. — As to enforcement of judgments, and exemptions, see § 1C-1601 et seq.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.

When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (1815, c. 887, P.R.; R.C., c. 45, s. 19; Code,

s. 462; Rev., s. 650; C.S., s. 697; 1949, c. 719, s. 2; 1995, c. 379, s. 14(a).)

Effect of Amendments. — The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, deleted "dollars; and every constable, for a like omission of duty, is subject to a fine of ten" following "fine of forty".

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.

CASE NOTES

Cited in Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

§ 1-339.52. Posting and publishing notice of sale of real property.

CASE NOTES

Cited in Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

§ 1-339.54. Notice to judgment debtor of sale of real property.

CASE NOTES

Statutory requirements for notice of an execution sale were met where the deputy sheriff attempted to locate the plaintiff by running his name through the computer of the Department of Motor Vehicles (DMV) (see now Division of Motor Vehicles), where the phone book was checked and no one with plaintiff's name was listed, where the deputy went to the address listed on the execution notice and to an address where plaintiff owned real property and the deputy could not locate plaintiff, and where plaintiff was served by certified mail at his last known address. Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.

(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held.

(c) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) The purchaser is entitled to possession, and
(2) The purchase price has been paid, and
(3) The sale or resale has been confirmed, and
(4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
(5) Application is made to such clerk by the purchaser of the property.

(d) An order for possession issued pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 1987, c. 627, s. 2.)

Editor's Note. —
Session Laws 1987, c. 627, s. 2, which added subsection (d), was effective July 16, 1987, and was applicable to all orders of possession granted or issued after that date.

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

Legal Periodicals. —
For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

Effect of Article. — This Article permits those who in good faith and under colorable title enter into possession of land under a mistaken belief that their title is good and who are subsequently ejected by the true owners to petition the court for compensation for the improvements they placed on the land. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

Betterments Statutes Do Not Create Right Against State. — Sovereign immunity is a common law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in § 41-10.1 cannot be broadened to include a claim for betterments under this section. The betterments statutes do not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601, cert. denied, 322 N.C. 838, 371 S.E.2d 284 (1988).

State May Not Be Sued for Betterments. — Construing § 41-10.1 strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

A deed issued at a tax foreclosure is color of title for the purpose of asserting betterments. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Cited in Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986).

§ 1-341. Annual value of land and waste charged against defendant.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

CASE NOTES

Options of Rightful Owners. — Rightful owners of lot must compensate defendants who purchased said property by quitclaim deed at a foreclosure sale for improvements. However, as this alternative may be impractical, rightful owners may opt to relinquish their estate to defendants, who in turn must pay rightful owners the value of the property in its unimproved condition; rightful owners are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. If rightful owners fail to exercise one of these options, the value of the improvements becomes a lien, and if not paid, a sale of the premises will be ordered. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

§ 1-347. Plaintiff's election that defendant take premises.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

Options of Rightful Owners. — Rightful owners of lot must compensate defendants who purchased said property by quitclaim deed at a foreclosure sale for improvements. However, as this alternative may be impractical, rightful owners may opt to relinquish their estate to defendants, who in turn must pay rightful owners the value of the property in its unimproved condition; rightful owners are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. If rightful owners fail to exercise one of these options, the value of the improvements becomes a lien, and if not paid, a sale of the premises will be ordered. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

§ 1-348. Payment made to court; land sold on default.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

ARTICLE 31.

Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

Stated in FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989).

Cited in Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

§ 1-352.1. Interrogatories to discover assets.

CASE NOTES

Refusal to Answer Not Justified. — The mere fact that an amendment to defendant's tax returns was selected for examination by the IRS was insufficient to justify defendant's refusal to answer interrogatories under this section, as there was insufficient evidence that his answers to the interrogatories could be used against defendant in a subsequent criminal action so as to create a real danger of self-incrimination. J.M. Heinike Assocs. v. Vesce, 86 N.C. App. 376, 357 S.E.2d 409, appeal dismissed, 320 N.C. 793, 361 S.E.2d 77 (1987).

§ 1-352.2. Additional method of discovering assets.

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

§ 1-353. Property withheld from execution; proceedings.

After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the district court district as defined in G.S. 7A-133 or superior court district as defined in G.S. 7A-41.1, as the case may be, where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this section and G.S. 1-352 although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 2; Rev., s. 688; C.S., s. 712; 1987 (Reg. Sess., 1988), c. 1037, s. 39.)

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.

CASE NOTES

Applied in Stackhouse v. Paycheck, 66 N.C. App. 713, 311 S.E.2d 705 (1984).

§ 1-358. Disposition of property forbidden.

CASE NOTES

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986).

§ 1-360. Debtors of judgment debtor may be summoned.

Upon the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars ($10.00), the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same; provided, however, that such inquiries may, in the discretion of the court, be answered by such person or corporation, or any officers or members thereof, by verified answers to interrogatories. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (C.C.P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 675; C.S., s. 719; 1989, c. 683; 1991, c. 426, s. 1; 1995, c. 257, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to judgments entered on or after that date, in the first sentence, at the beginning, substituted "Upon the issuing or return of an execution" for "After the return of an execution unsatisfied", and inserted "in the discretion of the court" following "such inquiries may".

CASE NOTES

Quoted in FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989).

§ 1-360.1. Execution on the property of debtors of judgment debtor.

After the clerk of superior court determines to the clerk's satisfaction that the debtor of the judgment debtor acknowledged at a proceeding conducted pursuant to G.S. 1-360 that he is in possession of unencumbered property of such judgment debtor or is indebted to him in an amount exceeding ten dollars ($10.00), an execution shall issue against the property or debt of the judgment debtor that the debtor of the judgment debtor acknowledged he holds. (1991, c. 426, s. 2; 1995, c. 257, s. 2.)

Editor's Note. — Session Laws 1991, c. 426, s. 3, made this section effective upon ratification. The act was ratified June 27, 1991.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to judgments entered on or after that date, deleted "After the return of an execution unsatisfied against property of the judgment debtor, or of any one of several debtors in the same judgment, and" from the beginning of the section.

§ 1-362. Debtor's property ordered sold.

CASE NOTES

Construction of Section. —

The general rule is that North Carolina's exemption laws are to be liberally construed in favor of the exemption. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

The State assumes the status of judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the State claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys' fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The developing jurisprudence does not require the state to absorb the expenses of providing court-appointed counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

An indigent receiving court-appointed counsel will never be required to repay the State unless he becomes financially able. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The statutes and court decisions that regulate North Carolina's ability to recover costs of court-appointed counsel meet constitutional requirements. The indigent defendant's fundamental right to counsel is preserved under the system; he is given ample opportunity to challenge the decision to require repayment at all critical stages; and he is protected against heightened civil or criminal penalties based solely on his inability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

This statute has been expanded by the state courts to preclude execution on any future earnings to satisfy a judgment. Harris v. Hinson, 87 N.C.

App. 148, 360 S.E.2d 118 (1987).

The courts in this State cannot, through supplemental proceedings on execution, order a receiver to receive a person's wages in order to satisfy a judgment rendered in this State. Harris v. Hinson, 87 N.C. App. 148, 360 S.E.2d 118 (1987).

Judgment Debtor Is Free to Dispose of His Earnings. — Under the law as it now stands in this State, a judgment debtor can receive his salary and dispose of it in any manner he chooses, regardless of whether it contains an amount of funds in excess of what is required to satisfy his and his family's reasonable living expenses. If the debtor elects to accumulate no property other than that which is exempt from execution, even if he squanders his excess funds with the express intent of avoiding paying a judgment that by all the laws of principle and fairness he should be made to satisfy, the judgment creditor is, in this State, helpless to collect his judgment. Harris v. Hinson, 87 N.C. App. 148, 360 S.E.2d 118 (1987).

Broad Language in Loan Documents No Waiver of Debtor's Right to Exemption. — Where a credit union contended that it had a valid security interest in the debtor's account by virtue of broad language in loan documents by which the debtors pledged to the credit union all deposits in their checking account with the credit union as security for an automobile loan, and the debtors filed a Chapter 7 bankruptcy action, the language of the loan documents did not constitute a waiver of debtors' right to exempt the account balance under either § 1C-1601 or this section. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Cited in In re Russell, 44 Bankr. 452 (Bankr. E.D.N.C. 1984); North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986); North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), cert. granted, 333 N.C. 167, 424 S.E.2d 909 (1992).

§ 1-363. Receiver appointed.

CASE NOTES

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984).

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

CASE NOTES

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by this section, which provides that the Rules of Civil Procedure and the provisions of this chapter are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Private Condemnation Proceedings. — Section 40A-12, together with this section, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Adoption Proceedings. — The Rules of Civil Procedure and the provisions of this Article apply to adoption proceedings. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Applied in Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984).

Cited in United States v. Mauney, 642 F. Supp. 1097 (W.D.N.C. 1986).

§ 1-394. Contested special proceedings; commencement; summons.

CASE NOTES

Cited in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.

CASE NOTES

Rights of Putative Father in Adoption Proceeding. — When a termination of parental rights order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, is filed with an adoption petition in lieu of the affidavit required by § 48-13, a subsequently filed affidavit may not relate back to the original filing date of the petition so as to cut off the rights of a putative father who filed a legitimation petition pursuant to § 49-10 before the affidavit was filed. In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985); Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860 (1988).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Article 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.

CASE NOTES

Cited in State v. Hewson, 88 N.C. App. 128, 362 S.E.2d 574 (1987).

§ 1-410. In what cases arrest allowed.

Editor's Note. — The next to last entry in the historical citation in this section, which appears in the main volume, should read: "1967, c. 1153, ss. 4, 6." The last entry in the historical citation in this section in the main volume should be deleted.

CASE NOTES

Execution Against Person for Cause Specified in Subdivision (1). — In accord with the main volume. See Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Award of Punitive Damages Not Sufficient. — Under the present language of § 1-311, an award of punitive damages in a cause of action specified under this section, alone, does not give rise to execution against the person. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Applied in Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 323 S.E.2d 506 (1984).

Cited in Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988).

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.1. Nature of attachment.

CASE NOTES

Function of Writ. —

Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring the property of the defendant within the legal custody of the court in order that it may be subsequently applied to the satisfaction of any judgment for money which may be rendered against defendant in the principal action. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Cited in In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986); Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

§ 1-440.2. Actions in which attachment may be had.

CASE NOTES

Workers Compensation Cases. — Section 97-95 provides a further action in which attachment may be had, and which must be read in pari materia with this section. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Uninsured Employer. — Section 97-95 merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal. As such, plaintiff's affidavit must meet one of the grounds for attachment listed in this section or § 1-440.11. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Stated in Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989).

Cited in Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

§ 1-440.3. Grounds for attachment.

CASE NOTES

The proper determination to be made regarding attachment is residence, not domicile. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Residence is taken to signify one's place of actual abode, whether it be temporary or permanent, and is thus distinguished from domicile, which indicates one's permanent abode, to which, when absent, one intends to return. Although the two terms have sometimes been used interchangeably, and although the statutory use of "residence" has sometimes been construed to mean "domicile," the two terms are quite distinct. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Property of State Resident Domiciled Outside State Held Not Subject to Attachment. — The trial court erred in concluding that defendant, who lived and paid taxes in North Carolina but was domiciled in the Netherlands, was a nonresident and that his interest in the subject property could be attached pursuant to subdivision (1) of this section. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

All Codefendants Need Not Be Nonresidents for Nonresidents' Property to Be Attached. — Subdivision (1) of this section authorizes attachment of the property of a nonresident defendant; it does not require that all codefendants be nonresidents in order for the property of those defendants who are nonresidents to be attached. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Stated in Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989); Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Cited in Moore v. Surles, 673 F. Supp. 1398 (E.D.N.C. 1987); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990).

§ 1-440.4. Property subject to attachment.

CASE NOTES

Defendant's property or choses in action in the hands of third persons, etc. —

By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

§ 1-440.9. Authority of court to fix procedural details.

CASE NOTES

Authority of Clerk to Stop Sale and Order Resale. — This section gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986), cert. denied, 319 N.C. 405, 354 S.E.2d 716 (1987).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

CASE NOTES

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.11. Affidavit for attachment; amendment.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.12. Order of attachment; form and contents.

CASE NOTES

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.

CASE NOTES

Perfection of Attachment by Alias and Pluries Order. — Without a valid levy, the order of attachment is not perfected so as to create a lien of attachment, but remains executory until tolled by judgment in the principal action, or until perfected by a levy under an alias or pluries order. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.14. Notice of issuance of order of attachment when no personal service.

(a) When service of process by publication is made subsequent to the original order of attachment, the published and mailed notice of service of process shall include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after publication is begun, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within 30 days after the issuance of the order of attachment. Such notice shall show

(1) The county and the court in which the action is pending,
(2) The names of the parties,
(3) The purpose of the action, and
(4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

(1) Shall be published once a week for four successive weeks in some newspaper published in the same district court district as defined in G.S. 7A-133 or superior court district or set off districts as defined in G.S. 7A-41.1, as the case may be, or
(2) Shall be posted at the courthouse door in the county for 30 days. (1947, c. 693, s. 1; 1967, c. 954, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 40.)

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.16. Sheriff's return.

CASE NOTES

The adequacy of the description of the property contained in a sheriff's return upon attachment should be decided on a case-by-case basis. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Posting a bond to release property from attachment estops a defendant from thereafter challenging any procedural defects in the process. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Applied in Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765 (1983).

§ 1-440.19. Levy on stock in corporation.

CASE NOTES

This section does not envision an attachment of an intangible ownership interest. Instead, the statute clearly and unambiguously provides that the proper means to attach stock of a corporation is for the sheriff to seize the stock certificate. Medoil Corp. v. Clark, 751 F. Supp. 88 (W.D.N.C. 1990).

§ 1-440.21. Nature of garnishment.

CASE NOTES

Cited in Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 500, 377 S.E.2d 88 (1989).

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.

CASE NOTES

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.

CASE NOTES

Bank's loan officer trainee was agent for purpose of serving attachment papers upon garnishee bank in accordance with this section since trainee's duties included collecting of loan payments on bank's behalf. Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989).

§ 1-440.28. Admission by garnishee; setoff; lien.

CASE NOTES

No Waiver of Setoff Right. — Where insolvent corporate defendant had $2,568.55 balance with bank, where defendant owed bank $5,000, plus interest on a note that had been past due for several months, where bank was attached as debtor of corporate defendant and was served with a summons and notice of levy, and where bank had honored a number of corporation's checks after note became due and did not assert its set off until account was attached, court incorrectly concluded that bank had waived its right of setoff against corporation since right to assert the setoff is recognized under subsection (f) of this section, and bank did not waive its setoff right by honoring some of company's checks after note became due. Killette v. Raemell's Sewing Apparel, Inc., 93 N.C. App. 162, 377 S.E.2d 73 (1989).

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.

CASE NOTES

Perfection by attachment occurs as to personal property upon levy. In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986).

When an order of attachment is perfected by a levy, a lien of attachment is created thereby which establishes the lienor's claim as against all other creditors and subsequent lienors. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lien Enforceable Against Subsequent Purchasers. —

A person claiming under a conveyance or encumbrance executed subsequent to the docketing of the notice of the order with respect to the property conveyed or encumbranced takes subject to the action whose pendency was so noted. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

The date to which the lien relates back and fixes the priority of the claim, with respect to real property, is the time at which the notice of the order of attachment is docketed in the record of lis pendens in the county where the property is located. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under this section failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.

CASE NOTES

Sheriff's liability under this section arises only when such loss, damage or destruction is caused by the sheriff's failure to exercise proper care and diligence to preserve the property. Butler v. Southeastern Millworks, Inc. (In re Bldrs. Supply, Inc.), 40 Bankr. 753 (Bankr. E.D.N.C. 1984).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties attack an attachment. Edwards v. Brown's Cabinets, 63 N.C.

App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Section 1-440.43 applies to any person who has acquired a lien upon or an interest in attached property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.37. Modification of the order of attachment.

CASE NOTES

Section 1-440.43 provides a method by which interested third parties may attack an attachment. Such section applies to any person who has acquired a lien upon or an interest in such property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.43. Remedies of third person claiming attached property or interest therein.

CASE NOTES

This section provides a method by which interested third parties may attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Subdivisions Interpreted. — With respect to subdivision (1), any person other than a defendant may dissolve an attachment order by the same method available to a defendant, and a defendant can dissolve an order of attachment "at any time before judgment in the principal action." With respect to subdivision (2), the language of § 1A-1, Rule 24 would govern, and the third party's motion to intervene must be made "upon timely application." Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with § 1-440.1 et seq. or this section. Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Owner of garage and wrecker service, with whom sheriff contracted to store certain cars levied on pursuant to court order, was a legal possessor, and under subsection (d) of § 44A-2 had a lien on the cars from the time he began towing them away. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Bank's Motion to Intervene Was Properly Denied. — Where the bank sought to intervene at the time of the hearing at which the trial court was ready to resolve the matter before it based on the pleadings and affidavits submitted by the parties, and where plaintiff's second complaint had been filed and served on counsel for defendant in October, where the record affirmatively disclosed that the same counsel had been representing the interests of the bank, as well as those of the bank's debtor since before June and was at all times since that date aware of the attachment proceedings, counsel for the bank had ample opportunity to intervene at any time after the filing of plaintiff's complaint, and the trial court did not abuse its discretion in denying the bank's motion to intervene. Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989).

Cited in Harshaw v. Mustafa, 84 N.C. App. 296, 352 S.E.2d 247 (1987); Harshaw v. Mustafa, 321 N.C. 288, 362 S.E.2d 541 (1987).

§ 1-440.44. When attached property to be sold before judgment.

CASE NOTES

Authority of Clerk to Stop Sale and Order Resale. — Section 1-440.9 gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986), cert. denied, 319 N.C. 405, 354 S.E.2d 716 (1987).

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

CASE NOTES

Stated in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

§ 1-474. Order of seizure and delivery to plaintiff.

(a) Order. — The clerk of court may, upon notice and hearing as provided in G.S. 1-474.1, and upon the giving by the plaintiff of the undertaking prescribed in G.S. 1-475, require the sheriff of the county where the property claimed is located to take said property from the defendant and deliver it to the plaintiff. The act of the clerk in issuing or refusing to issue the order to the sheriff is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction of the principal action.

(b) Expiration of Certain Orders. — When delivery of property is claimed from a debtor who allegedly defaulted on his payments for personal property purchased under a conditional sale contract, a purchase money security agreement or on a loan secured by personal property, an order of seizure and delivery to the plaintiff for that property expires 60 days after it is issued. (C.C.P., s. 178; Code, s. 323; Rev., s. 792; C.S., s. 832; 1973, c. 472, s. 1; 1985, c. 736.)

Editor's Note. — Session Laws 1985, c. 763, which added subsection (b), was effective October 1, 1985, and was applicable to orders of seizure and delivery issued on or after that date.

§ 1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.

CASE NOTES

Cited in Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993).

§ 1-480. Property concealed in buildings.

CASE NOTES

Although this section permits forcible entry, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to § 1-313(4). Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

Applied in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

I. General Consideration.
III. Grounds for Relief.
  C. Application of Section.

I. GENERAL CONSIDERATION.

Discretion of Court. —

It is proper for the court to take into account probable injuries to persons not parties to the action and to the public if a preliminary injunction were to be issued. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

Appeal. —

In accord with third paragraph in the main volume. See Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990).

In accord with the last paragraph in the main volume. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

In reviewing the grant of a preliminary injunction, the appellate court may weigh the evidence and find facts for itself. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Order Setting Injunction Bond Remanded Where Facts and Amount of Bond in Dispute. — Where order setting an injunction bond at $20,000 contained no findings of fact or conclusions of law relating to the amount of the bond, and facts were in dispute, remand was necessary for proper determination of the amount of the security bond. Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988).

III. GROUNDS FOR RELIEF.

C. Application of Section.

When Temporary Injunction Granted Generally. —

In accord with the second paragraph in the main volume. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

To receive a preliminary injunction, plaintiff must show the likelihood of success on the merits and some type of irreparable harm. This standard, however, does not require a showing that the injury is beyond repair, but that the injury is one to which complainant should not be required to submit or which the other party should be permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Injunction Awarded Only for Relief Sought. — Court did not err in dismissing plaintiffs' claims for preliminary injunctive relief, where, under a fair reading of plaintiffs' prayer for relief, the only preliminary injunctive relief requested was the enjoining of the disposal of school property, and although allegations may have been sufficient to show with particularity irreparable harm resulting from the expenditure of bond monies for the purchase of the facility, plaintiffs did not seek to enjoin that purchase. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Private Nuisance. — Where plaintiffs were likely to succeed on at least one of their claims (private nuisance) at a trial on the merits with regard to picketing of doctor's home by abortion protestors, the claim warranted injunctive relief. Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828, appeal dismissed and discretionary review denied, 335 N.C. 175, 436 S.E.2d 379 (1993), cert. denied, — U.S. —, 114 S. Ct. 2783, 129 L. Ed. 2d 894 (1994).

§ 1-494. Before what judge returnable.

All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within 20 days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within 10 days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. This removal continues in force the motion and application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction.

All restraining orders and injunctions granted by any judge of the district court shall be made returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending, within 20 days from the date of the order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application on the date set, or within 10 days thereafter, any district judge of the district authorized to hear in-chambers matters may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C.S., s. 852; 1963, c. 1143; 1973, c. 66, s. 3.)

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

CASE NOTES

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-502. In what cases appointed.

CASE NOTES

A receiver will not be appointed where, etc. —

The trial court did not have the statutory or equitable power to appoint a receiver where there was no evidence to indicate the property or its rents or profits were in danger of being lost or materially injured or impaired. Williams v. Liggett, 113 N.C. App. 812, 440 S.E.2d 331 (1994).

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between receiver appointed as provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-502.1. Applicant for receiver to furnish bond to adverse party.

Before a judge may appoint a receiver, the judge shall require the party making application for the appointment to furnish a bond payable to the adverse party in a form and amount approved by the judge. The bond shall secure payment by the applicant of all damages, including reasonable attorney fees, sustained by the adverse party by the appointment and acts of the receiver if the appointment is vacated or otherwise set aside. The judge may require that the amount of bond be increased for this purpose any time after the appointment of a receiver. (1983 (Reg. Sess., 1984), c. 994, s. 1.)

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 994, s. 2, made this section effective October 1, 1984, and applicable to applications for a receiver made on or after that date.

§ 1-504. Receiver's bond.

Cross References. — As to bonds in surety company, see § 58-73-1 et seq. (formerly codified as § 109-16 et seq.)

CASE NOTES

Cited in United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507. Validation of sales made outside county of action.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Selection of Counsel by Receiver. — When a receiver is directed by the court appointing him to employ counsel to assist him in the discharge of his duties, it is the receiver's duty to select an independent counsel rather than one who is acting for either party in the action. Where there is a perfect identity of interests between the plaintiffs and the receivers or where the parties have consented, the exception may arise, permitting a party's counsel to serve as counsel to the receiver. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

§ 1-507.3. Title and inventory.

CASE NOTES

Nothing in this section suggests that the receiver should take the property free of existing obligations. State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507.6. Proof of claims; time limit.

CASE NOTES

Corporate Officer's Burden of Proof. — North Carolina law places on an officer of a corporation the burden of proving that he was not unjustly enriched by his dealing with the corporation. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Where officer of corporation engaged in transactions which were not approved by the corporate defendants or shareholders, the burden was on him to prove that the transactions were just and reasonable. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Corporate Officer's Failure to Account. — Where a trial court found that a corporate officer's failure to account made it impossible for the receivers to defend against the claims of that officer and his wife against the corporation in liquidation, the trial court was therefore authorized, pursuant to § 1A-1, Rule 41(b), to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the order of the trial court. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Burden of Proof on Claimants to Receivership. — Where, in response to claims of a corporate officer and his wife made on the receivership, a judge ordered the court-appointed receivers to retain personal property claimed by the two claimants until there was a comprehensive accounting by the corporate officer to the defendant corporations, the order was consistent with this section, requiring claimants to receivership to prove their claims. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

As a claimant on the receivership, the wife of a corporate officer bears the burden of proving her claim and as such is subject to all valid defenses. Accordingly, she is subject to the court's authority over the receivership even if she is not a necessary party to the derivative action. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Claims Based on Joint Ownership. — A claimant in the liquidation of a corporation has the burden of proving her claims pursuant to this section. With respect to claims based on joint ownership, a defense against the claims of a party count as a defense to the joint claims of a spouse. The trial court was therefore justified in denying all the claims of a wife made jointly with her husband, a corporate officer, until an accounting was made to comply with a court order for the husband to make an accounting to the corporation. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

§ 1-507.7. Report on claims to court; exceptions and jury trial.

It is the duty of the receiver to report to the session of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within 10 days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge.

As to delinquency proceedings for insurance companies under Article 17A of General Statutes Chapter 58, such prior notice need be given only to those claimants whose presented claims have been denied or have not been adjudicated; and notice is satisfied by mailing either a general notice of application for distribution showing disposition of the claims or a copy of the application to such claimants. Proof of mailing with the United States Postal Service may be made by the receiver's certificate of service without either the necessity of postal receipt or the listing of individual claimants names and addresses. (1901, c. 2, s. 83; Rev., s. 1230; C.S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2; 1971, c. 381, s. 12; 1985, c. 666, s. 70.)

Editor's Note. — Much of Article 17A of Chapter 58, referred to in this section, was repealed by Session Laws 1989, c. 452, which also enacted an Article 46 of Chapter 58, containing similar provisions to those contained in the repealed sections of Article 17A. Article 46 of Chapter 58 has been recodified as Article 30 of Chapter 58.

CASE NOTES

Compliance with Notice Requirement Prerequisite to Discharge. — This section expressly prohibits issuance of order of discharge unless the receiver demonstrates compliance with the notice requirement. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

Vacation of Order for Failure to Comply with Notice Procedure. — Even where defendant had actual notice of hearing and did not show how it was prejudiced by noncompliance with the prescribed notice procedure, where there was no showing that notice was mailed to each claimant at least 20 days prior to the hearing, the order discharging the receiver would be vacated. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

§ 1-507.8. Property sold pending litigation.

CASE NOTES

Stated in State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989).

§ 1-507.9. Compensation and expenses; counsel fees.

CASE NOTES

Counsel Fees Where Employment Unlawful Because of Conflict of Interest. — Where the employment of an attorney by a receiver is unlawful by reason of his employment by an adverse party, he should not for that reason be denied a reasonable compensation for services which were necessary or valuable to the receiver, when performed with the usual fidelity and ability. Charges properly excluded would be for services rendered in a manner influenced by the attorney's professional connection with the adverse party. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

Review of Compensation of Persons Employed to Assist Receiver. — Those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

The allowance of commissions, etc.

In accord with first paragraph in original. See Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

§ 1-507.11. Reorganization.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

ARTICLE 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.

CASE NOTES

Stated in Rivenbark v. Southmark Corp., 93 N.C. App. 414, 378 S.E.2d 196 (1989).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 41.

Quo Warranto.

§ 1-515. Action by Attorney General.

An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:

(1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

(2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

(3) When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of G.S. 146-39. (C.C.P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C.S., s. 870; 1983, c. 768, s. 1.)

Editor's Note. — This section is set out to correct an error in subdivision (2) as it appears in the main volume.

CASE NOTES

Defendant's testimony concerning hearings held by a county board of elections was not hearsay, as defendant testified only as to what he had done, and he did not testify as to the results of the inquiry to the board of elections. Such evidence was relevant to the issue before the jury, that is, whether defendant has usurped, intruded into, or unlawfully held his public office. State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

Quoted in Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 415 S.E.2d 201 (1992).

Stated in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 1-527. Judgment in such actions.

CASE NOTES

Applied in State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

§ 1-531. Refusal to surrender official papers misdemeanor.

If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a Class 1 misdemeanor. (C.C.P., s. 372; Code, s. 612; Rev., s. 3601; C.S., s. 886; 1993, c. 539, s. 2; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§ 1-532. Action to recover property forfeited to State.

CASE NOTES

This section describes a category of contraband which is not per se illegal to possess at all times but only derivatively subject to seizure due to its connection with illegal acts. State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

For a comparison of contraband per se and derivative contraband discussed in a Maryland case but recommended by the North Carolina Court of Appeals, see State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.

CASE NOTES

Waste Defined. —

Waste, at common law, was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

With reference to the lessor-lessee situation, waste has been defined as an implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Where the evidence did not conclusively show that defendants, lessees under a 30 year lease, committed waste, and on the contrary, there was plenary evidence that defendants made extensive improvements to all the rental units on the property, which they would be expected to do under a 30 year lease, plaintiff failed to establish a clear and uncontradicted prima facie case on the issue of waste, and the trial court erred in entering a directed verdict for plaintiff on this issue. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

§ 1-536. Action by tenant against cotenant.

CASE NOTES

Stated in Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

§ 1-538. Judgment for treble damages and possession.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case", see 67 N.C.L. Rev. 681 (1989).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-538.1. Strict liability for damage to person or property by minors.

Any person or other legal entity shall be entitled to recover actual damages suffered in an amount not to exceed a total of two thousand dollars ($2,000) from the parent or parents of any minor who shall maliciously or willfully injure such person or destroy the real or personal property of such person. Parents whose custody and control have been removed by court order or by contract prior to the act complained of shall not be liable under this act. This act shall not preclude or limit recovery of damages from parents under common law remedies available in this State. (1961, c. 1101; 1981, c. 414, s. 1; 1993, c. 540, s. 1.)

Editor's Note. — Session Laws 1993, c. 540, s. 1, which changed dollar amount from one thousand to two thousand dollars, was effective October 1, 1993, and was applicable to causes of action arising on or after that date.

CASE NOTES

Application of Section. — The limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to this section is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under § 7A-649. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

§ 1-538.2. Civil liability for larceny, shoplifting, theft by employee, embezzlement, and obtaining property by false pretense.

(a) Any person, other than an unemancipated minor, who commits an act that is punishable under G.S. 14-72, 14-72.1, 14-74, 14-90, or 14-100 is liable for civil damages to the owner of the property. In any action brought by the owner of the property he is entitled to recover the value of the goods or merchandise, if the goods or merchandise have been destroyed, or any loss of value to the goods or merchandise, if the goods or merchandise were recovered, or the amount of any money lost by reason of the theft or embezzlement or fraud of an employee. In addition to the above, the owner of the property is entitled to recover any consequential damages, and punitive damages, together with reasonable attorneys fees. The total compensatory and consequential damages awarded to a plaintiff against a defendant under this section shall not be less than one hundred fifty dollars ($150.00) and shall not exceed one thousand dollars ($1,000), except an act punishable under G.S. 14-74 or G.S. 14-90 shall have no maximum limit under this section.

(b) The parent or legal guardian, having the care, custody and control of an unemancipated minor who commits an act punishable under G.S. 14-72, 14-72.1, 14-74, 14-90, or 14-100, is civilly liable to the owner of the property obtained by the act if such parent or legal guardian knew or should have known of the propensity of the child to commit such an act; and had the opportunity and ability to control the child, and made no reasonable effort to correct or restrain the child. In an action brought against the parent or legal guardian by the owner, the owner is entitled to recover the amounts specified in subsection (a) except punitive damages. The total compensatory and consequential damages awarded to a plaintiff against the parent or legal guardian shall not be less than one hundred fifty dollars ($150.00) and shall not exceed one thousand dollars ($1,000).

(c) An action may be brought under this section regardless of whether a criminal action is brought or a criminal conviction is obtained for the act alleged in the civil action.

(c1) For the purposes of this section, consequential damages shall include, but shall not be limited to:

(1) The salary paid to any employee for investigation, reporting, testifying, or any other time related to the investiga-

tion or prosecution for any violation under subsection (a) of this section; and

(2) Any costs, such as mileage, postage, stationery, or telephone expenses that were incurred as a result of the violation.

(c2) The owner of the property may seek payment for damages under subsections (a) and (b) of this section prior to filing a civil action, by sending the violator a demand letter. If such a letter is sent, it shall be substantially similar to the following:

"Our records show that on (date), you unlawfully took possession of property from (store name/owner of the property), located in (city, state), without the consent of (store name/owner of the property), without paying for the property, and with the intent of converting the property to your own use. In accordance with G.S. 1-538.2, we are authorized to demand that you pay damages of one hundred fifty dollars ($150.00).

In the event you fail to comply with our demand for one hundred fifty dollars ($150.00) within 15 days from the date of your receipt of the notice, you may be held civilly liable for an amount not less than one hundred fifty dollars ($150.00) and not more than one thousand dollars ($1,000) in a civil action against you to recover the penalties and damages authorized by law, which include court costs and attorneys' fees. If you pay the one hundred fifty dollars ($150.00), (store name/owner of the property) will have no further civil remedy against you arising from the events occurring on (date).

If you are the parent or legal guardian of an unemancipated minor who unlawfully took possession of property as set out above, you can be held liable if you knew or should have known of the propensity of the child to commit the act complained of, and you had the opportunity and ability to control the child and you made no reasonable effort to correct or restrain the child.

If you believe you have received this notice in error, please contact (name) immediately.

YOU HAVE A RIGHT TO CONTEST YOUR LIABILITY IN COURT."

(c3) The owner of the property sending the demand letter required by this section shall have qualified privilege from any civil liability resulting therefrom provided that there is no excessive publication and that the owner acted in good faith and without malice.

(c4) If the recipient of a notice pursuant to subsection (c2) of this section pays the demanded one hundred fifty dollars ($150.00) within 15 days of the recipient's receipt of the notice, the owner of the property shall have no further civil remedy against that violator for the incident described in the notice.

(d) Nothing contained in this act shall prohibit recovery upon any other theory in the law. (1987, c. 519, s. 1; 1987 (Reg. Sess., 1988), c. 1081, s. 4.1; 1995, c. 185, s. 1.)

Editor's Note. — Session Laws 1987, c. 519, s. 2 made this section effective October 1, 1987, and applicable to acts committed on or after that date.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to acts committed on or after that date, rewrote the catchline; in the first sentence of subsections (a) and (b) substituted "G.S. 14-72, 14-72.1, 14-

74, 14-90, or 14-100" for "G.S. 14-72.1 or G.S. 14-72"; in subsection (a), inserted "theft or" preceding "embezzlement" in the third sentence, deleted the former fourth sentence regarding treble damages and rewrote the last sentence; added the last sentence in subsection (b); deleted the former first sentence of subsection (c) regarding liability and posting a sign regarding theft by an employee; and added subsections (c1), (c2), (c3), and (c4).

§ 1-539. Remedy for nuisance.

CASE NOTES

Plaintiffs were not entitled to recover for future flooding in nuisance proceeding. Plaintiff's remedy in nuisance proceeding between private parties is by successive suits brought from time to time against the author of the nuisance as long as the noxious condition is maintained, in which he may recover past damages down to the time of trial. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

CASE NOTES

Application of Section. — In order for this statute to apply, the defendant must be a trespasser to the land and must injure, cut or remove wood, timber, shrubs, or trees thereon or therefrom. Matthews v. Brown, 62 N.C. App. 559, 303 S.E.2d 223 (1983).

Damages Are to Be Assessed Before Crediting Defendant. — Where trial judge signed a judgment which denied plaintiff's motion to double the timber value because he found that credits to defendant left no damages to double, the trial court erred in failing to double the damages for the unlawful cutting of timber pursuant to subsection (a) of this section; the $22,000.00 amount assigned to the value of the cut timber should have been doubled to equal a $44,000.00 judgment against defendant. Because plaintiff had stipulated that defendant was to be allowed a credit for proceeds recovered by plaintiff and for the value of timber left on the ground at the tract, defendant was entitled to a credit from the $44,000.00 judgment in the amount of $20,140.00. Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992).

Defendant's entry upon plaintiff's land was authorized even though defendant knew or should have known that plaintiff's president exceeded his authority when he signed and accepted payment under the agreement made with defendant; since neither the officers, directors nor shareholders of plaintiff objected at any time to the timber being cut and removed, the cutting and removal of timber was in the ordinary course of plaintiff's business and plaintiff had authorized the president to clear the land, plaintiff's president had the apparent authority to bind plaintiff-corporation to the timber agreement with defendant, and the trial court was correct in granting defendant's motion for summary judgment on the trespass claim. Sentry Enters., Inc. v. Canal Wood Corp., 94 N.C. App. 293, 380 S.E.2d 152 (1989).

Award of Double Damages Is Not Within the Judge's Discretion. — Trial judge erred by refusing to instruct the jury to award double damages and by subsequently failing to order double damages. The phrase "shall be liable" in the statutory provision provides that double damages must be ordered when the requirements of the statute are met. The plain language of the statute indicates that an award of double damages is not within the judge's discretion. Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992).

Applied in Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

Cited in Hollowell v. Hollowell, 107 N.C. App. 166, 420 S.E.2d 827 (1992).

ARTICLE 43B.

Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.

Editor's Note. — Session Laws 1987, c. 505, s. 1 added "and Qualified Immunity for Volunteers" in the heading to Article 43B.

§ 1-539.10. Immunity from civil liability for volunteers.

(a) A volunteer who performs services for a charitable organization is not liable in civil damages for any acts or omissions resulting in any injury, death, or loss to person or property arising from the volunteer services rendered if:

(1) The volunteer was acting in good faith and the services rendered were reasonable under the circumstances; and

(2) The acts or omissions do not amount to gross negligence, wanton conduct, or intentional wrongdoing.

(3) The acts or omissions did not occur while the volunteer was operating or responsible for the operation of a motor vehicle.

(b) To the extent that any charitable organization or volunteer has liability insurance, that charitable organization or volunteer shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance for the negligence by any volunteer.

(c) Nothing herein shall be construed to alter the standard of care requirement or liability of persons rendering professional services. (1987, c. 505, s. 1(2).)

Editor's Note. — Session Laws 1987, c. 505, s. 2 made this section effective upon ratification, and applicable only to causes of action arising after that date. The act was ratified June 29, 1987.

§ 1-539.11. Definitions.

As used in this Article:

(1) "Charitable Organization" means an organization that has humane and philanthropic objectives, whose activities benefit humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward and is exempt from taxation under either G.S. 105-130.11(a)(3) or G.S. 105-130.11(a)(5) or Section 501(c)(3) of the Internal Revenue Code of 1954.

(2) "Volunteer" means an individual, serving as a direct service volunteer performing services for a charitable, nonprofit organization, who does not receive compensation, or anything of value in lieu of compensation, for the services,

other than reimbursement for expenses actually incurred. (1987, c. 505, s. 1(2).)

Editor's Note. — Session Laws 1987, c. 505, s. 2 made this section effective upon ratification, and applicable only to causes of action arising after that date. The act was ratified June 29, 1987.

§§ 1-539.12 through 1-539.14: Reserved for future codification purposes.

ARTICLE 43C.

Actions Pertaining to Local Units of Government.

§ 1-539.16. Notice of claims against local units of government.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child. (1975, c. 685, s. 1; 1985, c. 201; 1989, c. 782, s. 2.)

Editor's Note. — Session Laws 1989, c. 782, s. 2, which inserted "or child", was effective August 12, 1989, and was applicable to actions arising on or after that date.

Legal Periodicals. —

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of Lee v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For comment on "The Last Pangs of Parent-Child Immunity in North Carolina: Lee v. Mowett Sales Co. and Allen v. Allen," see 22 Wake Forest L. Rev. 607 (1987).

For note, "It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?—Coffey v. Coffey and North Carolina General Statutes Section 1-539.21," see 68 N.C.L. Rev. 1317 (1990).

For note, "Closing One Door on the Parent-Child Immunity Doctrine: Legislature Rejects the Decision of Coffey v. Coffey," see 13 Campbell L. Rev. 105 (1990).

For note, "The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: Doe v. Holt," see 71 N.C.L. Rev. 1227 (1993).

CASE NOTES

This section does not violate substantive due process because it does not deny a parent seeking to bring an action against a child for personal injury a right to which she otherwise would be entitled. Before this statute was enacted, the established rule was that both children and their parents were immune from such suits by each other. This section abolished parental immunity and opened an avenue for children to sue their parents. To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views this section as "denying" parents of such a right, such denial is within the rights of the Legislature. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The class created by this section was based on a "reasonable distinction." It is rationally related to the governmental objective of promoting and protecting domestic harmony. This section is not in violation of the equal protection requirements in the North Carolina or United States Constitutions. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

It is the general rule in North Carolina that unemancipated minors may not maintain an action against their parents to recover damages for an unintentional tort. Since the parent cannot be held liable in a direct action against him by the injured child, a third-party may not maintain an action against the parent, based on allegations of joint negligence, to recover contribution for damages awarded to the minor. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

By the enactment of this section, the Legislature created a limited exception to the common-law doctrine of parent-child immunity in North Carolina. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

This section abolishes only a parent's immunity to suit. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The text of this section is very explicit and it, not the title, controls, despite the contention that the title implies total abolition of the parent-child immunity doctrine. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

It is not this section standing alone which abrogates parental immunity in wrongful death actions arising out of operation of motor vehicles; it is this section and § 28A-18-2, read in pari materia, which bring about this result. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

A riding lawnmower is not a "motor vehicle" within the meaning of this section. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

For case declining to judicially abolish the parent-child immunity doctrine in cases not involving motor vehicles, see Lee ex rel. Schlosser v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986).

Wrongful Death Action by Child's Estate. — A wrongful death action based on defendant mother's negligence in operation of a motor vehicle could be maintained on behalf of deceased child's estate against defendant mother, but only the father would be entitled to share in any recovery. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Father would not be barred from sharing in any recovery by his son's estate where the estate's recovery would be grounded, if at all, solely on the negligence of the child's mother. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Adult Child's Immunity from Suits by Parents for Conduct Occurring While Unemancipated Minor. — This section's exception to the parent-child immunity doctrine did not abolish the unemancipated minor's immunity from suits by his parents; furthermore, defendant, who had reached age of majority at the time of the lawsuit, remained immune from suit by his mother, plaintiff, for negligent conduct occurring when defendant was an unemancipated minor. Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).

Cited in Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); State Farm Mut. Auto. Ins. Co. v. Holland, 90 N.C. App. 730, 370 S.E.2d 70 (1988); Doe ex rel. Connolly v. Holt, 332 N.C. 90, 418 S.E.2d 511 (1992); Liner v. Brown, 117 N.C. App. 44, 449 S.E.2d 905 (1994).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

CASE NOTES

I. In General.
II. Illustrative Cases.

I. IN GENERAL.

Elements of Accord, etc. —
An accord is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim, arising from tort or contract, and the other party agrees to accept the performance even though it is different from what he considered himself entitled to; satisfaction is the completion or execution of the agreed performance. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Quoted in Hassett v. Dixie Furn. Co., 333 N.C. 307, 425 S.E.2d 683 (1993).

Stated in State Distrib. Corp. v. G.E. Bobbitt & Assocs., 62 N.C. App. 530, 303 S.E.2d 349 (1983).

II. ILLUSTRATIVE CASES.

Checks. —
When there is some indication on a check that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Where it was uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim, this established an accord and satisfaction as a matter of law. When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

§ 1-540.3. Advance payments.

CASE NOTES

Insurer's Duty to Defend Insured Broader Than Duty to Indemnify. — Insurer's duty to defend its insured is separate from and broader than the insurer's duty to indemnify the insured. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988), aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990).

Insurance company was required to continue defending insured until a settlement or judgment was reached despite having paid its policy limits under this section. Brown v. Lumbermens Mut.

Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988), aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990).

No claim for reimbursement may be made or allowed by the party making the advance payment against the recipient, except for fraud. Gunn v. Whichard, 707 F. Supp. 196 (E.D.N.C. 1988).

Stated in Brown v. Lumbermens Mut. Cas. Co., 326 N.C. 387, 390 S.E.2d 150 (1990).

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

Legal Periodicals. —

For note on arbitration and punitive damages, in light of Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986), see 64 N.C.L. Rev. 1145 (1986).

For article, "Court-Ordered Arbitration Comes to North Carolina and the Nation," see 21 Wake Forest L. Rev. 901 (1986).

For survey of North Carolina construction law, with particular reference to arbitration, see 21 Wake Forest L. Rev. 633 (1986).

For note, "No Frills Justice: North Carolina Experiments with Court-Ordered Arbitration," see 66 N.C.L. Rev. 395 (1988).

For article, "Arbitration and Constitutional Rights," see 71 N.C.L. Rev. 81 (1992).

CASE NOTES

The purpose of arbitration, etc. —

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Read in its entirety, the Uniform Arbitration Act appears to create a system of problem resolution with minimal judicial intervention. This Act provides a means by which parties can agree contractually to limit judicial intervention into their disputes. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Legislative Intent. — Read as a whole, the Uniform Arbitration Act provides parties with a means to bypass the morass of judicial litigation, while still maintaining the judicial doors ajar for recalcitrant disputes. Hence, it would appear that the legislature intended the courts to send certain predetermined issues to arbitration and then to step back until the arbitration proceeding is complete. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Purpose Behind Enactment of Uniform Act. — The principle legislative purpose behind enactment of the Uniform Arbitration Act is to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation — attorneys' fees. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Confirmation of Arbiter's Decision. — An agreement to arbitrate does not cut off a party's access to the courts. On the contrary, an action compelled to arbitration must have the arbiter's decision confirmed by the court. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (§§ 1-567.1 through 1-567.20) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provision. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Though the act requires that certain disputes be removed from direct judicial supervision, the court that compels arbitration does not lose jurisdiction. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

"Hands-off" Period. — The act creates a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a "hands-off" attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbiter's award. At no time does the trial court lose jurisdiction. However, during the "hands-off" period, the trial court must not interfere with the arbitration proceeding. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Strict Confidentiality Not Required. — Nothing in the North Carolina statutes governing arbitration requires strict confidentiality. Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984).

Applied in Rustad v. Rustad, 68 N.C. App. 58, 314 S.E.2d 275 (1984); Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796 (1989).

Cited in Adams v. Nelson, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Servomation Corp. v. Hickory Constr. Co., 74 N.C. App. 603, 328 S.E.2d 842 (1985); Sturm v. Schamens, 99 N.C. App. 207, 392 S.E.2d 432 (1990).

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

Public Policy Favors Arbitration. — There exists in North Carolina a strong public policy in favor of settling disputes by arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

This section provides that a contract provision requiring that the parties settle disputes by arbitration is valid, enforceable, and irrevocable unless the parties agree to the contrary. Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 414 S.E.2d 30 (1992).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (§§ 1-567.1 through 1-567.20) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury; thus, the trial court erred in concluding that because arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under § 22B-10, and in violation of N.C. Const., art. I, §§ 18 and 25. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Valid Agreement Must Exist. — Public policy favors settling disputes by means of arbitration; however, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

Burden on Party Seeking Arbitration. — The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

Valid Agreement Found. — Agreement in construction contract between general contractor to painting subcontractor held a valid written agreement to arbitrate disputes under this section. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

The law of contracts governs the issue of whether there exists an agreement to arbitrate. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

Scope of Arbitration Topics. — There is no legislative bar to arbitrating claims which are based on tortious conduct or unfair and deceptive trade practices and claims for punitive damages as long as they arise out of or relate to a contract that provides for arbitration on its breach. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Whether Claim Is Arbitrable Controlled by Language in Agreement. — The determination of whether a particular claim is arbitrable is controlled by the language of the parties' agreement. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

An unfair and deceptive practices claim pursuant to § 75-1.1 is proper for arbitration. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive practices, or of claims for punitive damages, as long as they arise out of or relate to the contract or its breach. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act. In light of the strong policy in this state favoring arbitration, such claims are arbitrable. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Arbitration Not Binding for Child Support or Custody. — Because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not binding. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provisions. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

The mere filing of pleadings by both parties does not constitute waiver of an arbitration provision. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

A party does not impliedly waive his right to arbitration when he pursues an action in court by filing a complaint. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Although arbitration is a contractual right which may be waived, the mere filing of a complaint or answer does not result in waiver of arbitration, absent evidence showing prejudice to the adverse party. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

Nor Does Filing a Claim of Lien. — Plaintiff's filing of a claim of lien and his institution of suit to enforce it does not prohibit him from pursuing his claim for arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

A party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in § 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in this section that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since § 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. In re Gencorp, Inc., 622 F. Supp. 216 (W.D.N.C. 1985).

Standard Form Provisions. — For discussion of interpretation of building contract containing standard form provisions issued by the American Institute of Architects (AIA) and the United States Department of Commerce Economic Development Administration (EDA), see Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Denial of Arbitration Held Proper. — Where defendants had been prejudiced by plaintiff's use of judicial discovery procedures and because defendants had expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration trial, court did not err in denying arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Stated in Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

This section provides means for a party to seek court determination of whether an agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Effect of Section. — This section provides the means by which a party on notice of intent to arbitrate may object to or seek to stay a demand for arbitration on the grounds that there is no agreement to arbitrate. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The only prerequisite to invoking this Act is that there be a valid written agreement to arbitrate the dispute. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Judge Must Decide Whether Valid Arbitration Agreement Exists. — By the plain terms of this section the judge is required to summarily determine whether, as a matter of law, a valid arbitration agreement exists. The trial judge erred by applying a summary judgment standard of whether there was a genuine issue of material fact with regard to the validity and enforceability of the parties' agreement. Routh v. Snap-On Tools Corp., 101 N.C. App. 703, 400 S.E.2d 755 (1991).

Without Such Determination, Order Is Not Appealable. — Where the trial court had not yet summarily determined the issue of whether the parties had entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration was not appealable. Lee County Bd. of Educ. v. Adams Elec., Inc., 106 N.C. App. 139, 415 S.E.2d 576 (1992).

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Court's inquiry under this section not limited to question of whether agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Upon proof of arbitration agreement the court may still determine preliminary questions of res judicata and the preliminary question of waiver. Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, 312 S.E.2d 709, rev'd on other grounds, 312 N.C. 224, 321 S.E.2d 872 (1984).

The trial court has authority to act both before and after, rather than during the arbitration proceeding. This interpretation is supported by the fact that the act will not permit an arbitration proceeding to be stayed for any reason other than to determine whether the prerequisite agreement to arbitrate exists or if the contract was induced by fraud. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Retention of Jurisdiction. —

Application by defendants to the court for arbitration pursuant to this section would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act (§§ 1-567.1 through 1-567.20), and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

A superior court judge cannot lift a stay granted by another superior court judge on a case which has been referred to arbitration by consent order and "discontinued." Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Standard Form Provisions. — For discussion of interpretation of building contract containing standard form provisions issued by the American Institute of Architects (AIA) and the United States Department of Commerce Economic Development Administration (EDA), see Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Limited Participation in Arbitration Not Waiver. — Where plaintiff filed its objection before the hearing was commenced and followed the correct procedure by applying for a court order to stay the arbitration proceeding pursuant to this section, plaintiff's limited participation in the arbitration before it filed its amended answer did not operate as a waiver of its right to object. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Filing of Pleadings Does Not Waive Arbitration Provision. — To hold that the mere filing of pleadings or other motions in a pending lawsuit constitutes waiver of a contractual arbitration provision would make parts of this section nonsensical. For example, subsection (c) of this section provides that if an issue subject to a contractual provision to arbitrate is involved in a pending lawsuit, any party to the contract can apply to the court for an order directing arbitration. This indicates that the General Assembly contemplated the possibility that a party would apply for arbitration after a lawsuit had begun. By expressly providing that a party may apply for an order compelling arbitration after suit has begun and by providing that in such a case the court must order arbitration in accordance with subsection (a) of this section, it is clear that the Legislature could not have intended that the mere filing of pleadings causes a waiver of a contractual arbitration provision. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Although Right to Arbitrate May Be Impliedly Waived. — Although subsections (a) and (d) of this section authorized the court to stay litigation and compel arbitration where parties have contracted to arbitrate their disputes, the right to arbitrate, as other contract rights, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Servomation Corp. v. Hickory Constr. Co., 70 N.C. App. 309, 318 S.E.2d 904 (1984), cert. granted and case remanded for reconsideration in light of Cyclone Roofing Co. v. La Fave Company, 312 N.C. 224, 321 S.E.2d 872 (1984), rev'd on other grounds, 316 N.C. 543, 342 S.E.2d 853 (1986).

How Right to Arbitration May Be Waived. — A party impliedly waives his contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under § 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Objections to Arbitration. — This provision clearly contemplates that objections to arbitration proceedings may be raised after the institution of the proceedings. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C.

337, 378 S.E.2d 799 (1989).

Objection Held Timely. — Where plaintiff raised its objection before the hearing on the merits and before the selection of arbitrators was complete, the objection was timely. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Order compelling arbitration was interlocutory and did not affect a substantial right. North Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

Denial of Arbitration Held Proper. — Where defendants had been prejudiced by plaintiff's use of judicial discovery procedures and because defendants had expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration trial court did not err in denying arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Applied in Paramore v. Inter-Regional Fin. Group Leasing Co., 68 N.C. App. 659, 316 S.E.2d 90 (1984).

Quoted in Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

Stated in Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

Cited in County of Durham v. Richards & Assocs., 742 F.2d 811 (4th Cir. 1984); Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113 (4th Cir. 1993).

§ 1-567.5. Majority action by arbitrators.

CASE NOTES

Applied in Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

§ 1-567.6. Hearing.

CASE NOTES

Notice Found Sufficient to Alert Defendants of Joint and Several Liability. — Where defendants, who were general partners, were sued individually and the prayer for relief asked for enforcement of arbitration award against all defendants jointly and severally, the individual defendants were on notice that plaintiff's complaint sought to hold them liable for any award made in the arbitration. With that knowledge, defendants filed an answer requesting that the action be stayed pending determination of the claims in the arbitration proceeding. Therefore, defendants were on notice that the arbitration proceeding would affect them individually, and not only as partners, even though the defendants were not named individually in the arbitration proceeding. George W. Kane, Inc. v. Bolin Creek West Assocs., 95 N.C. App. 135, 381 S.E.2d 832 (1989).

Misconduct by Arbitrators Shown. — Appellants sufficiently met their heavy burden under § 1-567.13 in demonstrating arbitrator's misconduct where the evidence showed that during the arbitration of a construction contract dispute, the arbitration panel collectively harassed and badgered witness and appellant's attorney, refused to hear evidence, and constantly used profanity and sarcastic comments during the proceedings. Wildwoods of Lake Johnson Assocs. v. L.P. Cox Co., 88 N.C. App. 88, 362 S.E.2d 615 (1987), cert. denied, 322 N.C. 838, 371 S.E.2d 285 (1988).

Cited in McMillan v. State Farm Fire & Cas. Co., 93 N.C. App. 748, 379 S.E.2d 88 (1989).

§ 1-567.7. Representation by attorney.

CASE NOTES

Cited in McMillan v. State Farm Fire & Cas. Co., 93 N.C. App. 748, 379 S.E.2d 88 (1989).

§ 1-567.8. Witnesses; subpoenas; depositions.

CASE NOTES

An award is ordinarily presumed to be valid and the party trying to set aside the award has the burden of demonstrating an objective basis which supports his allegation that one of the arbitrators acted improperly. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Discovery Limited. — The discovery procedures available during arbitration are limited by statute. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Contrary to a civil case at law, where there exists a broad right to discovery, discovery during arbitration is at the discretion of the arbitrator and further requires that the deponent cannot be subpoenaed or is unable to attend the hearings. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

§ 1-567.9. Award.

CASE NOTES

Procedure Must Be Strictly Followed. — Both statutory provisions (§§ 1-567.13 and 1-567.14) establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

As this section is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by § 1-567.13. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

What Sums May Be Awarded. — On arbitration of claim of contractor for balance due, if any, on contract, and damages due by contractor and claimed by owner arising from deficiencies in design and construction of a building, the arbitrators had authority to award sums, costs of delays caused by owner, certain fees and expenses of arbitration, with the exception of attorney's fees, and compensation for transferring the proprietary right to the design of knitting and seaming vacuum system, under the provisions of the parties' contract and the Uniform Arbitration Act (§§ 1-567.1 through 1-567.20). G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

§ 1-567.10. Change of award by arbitrators.

CASE NOTES

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Since the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Cited in G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815 (1987); Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989).

§ 1-567.11. Fees and expenses of arbitration.

CASE NOTES

Legislative Intent Regarding Attorneys' Fees. — The specific, uncomplicated language of this section clearly reflects the legislative intent that attorneys' fees are not to be awarded for work performed in arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorneys' fees are collectible only under § 6-21.2. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Attorneys' fees are not a subject of arbitration even if the contract in dispute provides for such fees. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

This section excludes attorneys' fees from an award to be rendered by the arbitrators since such fees are only collectible under § 6-21.2. An award of arbitration specifically awarded attorneys' fees and exceeded the arbitrators' authority. Therefore, the trial court properly denied motion to confirm the arbitrators' award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Court May Not Expand Award to Include Attorneys' Fees. — The Arbitration Act does not permit an arbitration award, duly made under the act, to be expanded by the court of jurisdiction on confirmation to include attorneys' fees for work conducted in the arbitration proceeding. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Agreement Held Not to Provide for Attorneys' Fees. — Where the only mention of attorneys' fees in agreement was under a section which dealt solely with indemnification of either party in the event of incurred liability or obligation to a third party, the reference was not sufficient to show that the parties' "agreement to arbitrate" provided otherwise in negating the prohibition and exclusion of counsel fees contained in this section. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Applied in Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

§ 1-567.12. Confirmation of an award.

CASE NOTES

Arbitration Not Infallible. — While the public policy of this State favors confirmation of arbitration awards, such awards are not infallible. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

An award is conclusive on matters of law and fact if decided in accordance with the legal construction of the contract in which the arbitrators derive their authority. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

In as much as the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 460, 307 S.E.2d 362 (1983).

The vacating of an arbitration award renders the consideration of an application to confirm moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Cited in Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42 (1986); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815 (1987); Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992); Creative Homes & Millwork, Inc. v. Hinkle, 109 N.C. App. 259, 426 S.E.2d 480 (1993).

§ 1-567.13. Vacating an award.

CASE NOTES

This section and § 1-567.14 provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987); Sentry Bldg. Sys. v. Onslow County Bd. of Educ., 116 N.C. App. 442, 448 S.E.2d 145 (1994).

This section provides the exclusive grounds and procedure for vacating an award, while § 1-567.14 provides the exclusive grounds and procedure for modifying or correcting an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Compliance with § 1-567.9 is mandatory. — Both statutory provisions (this section and § 1-567.14) establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

As § 1-567.9 is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by this section. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

No Right of Appeal. — If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party. There is no right of appeal, and the court has no power to revise the decisions of judges who are of the parties' own choosing. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

Attacks on Regularity, etc. —

In accord with first paragraph in original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Argument that an arbitrator who errs as a matter of law exceeds his powers and that as a result the award can be vacated was without merit, as such argument was inconsistent with the general rule that errors of law or fact, or an erroneous decision of matters submitted to arbitration, are insufficient to invalidate an award fairly and honestly made. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

The discovery of new evidence is not grounds for vacating or refusing to enforce the arbitrator's award. Wilks v. American Bakeries Co., 563 F. Supp. 560 (W.D.N.C. 1983).

And the party seeking to set it aside, etc. —

An arbitration award is presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Record Must Show That Arbitrators Exceeded Authority. — Before an award can be vacated on grounds that the arbitrators exceeded their authority, the record must objectively disclose that the arbitrators did exceed their authority in some respect. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

But May Be Acquainted with Case or Parties. —

In a 1987 arbitration proceeding, where the neutral arbitrator's firm had done work for defendant in 1965 and 1968, and the arbitrator himself had performed some consulting work for defendant in 1979 and 1980 for a fee of $797.29, these facts, coupled with plaintiff's constructive knowledge of these contacts, would not require vacation of the award or deposition of the arbitrators. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Fact that arbitrator had appeared as an expert witness for clients of opposing counsel's former law firm was alone insufficient to establish an objective basis for believing that the arbitrator was biased. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457, 347 S.E.2d 457 (1986).

Parties May Depose Arbitrators. —

A party to an arbitration may depose the arbitrator relative to alleged misconduct only when an objective basis exists for a reasonable belief that misconduct has occurred. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

An arbitrator must act within the scope of the authority, etc. —

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the North Carolina Uniform Arbitration Act (§§ 1-567.1 through 1-567.20) and hence of the arbitration agreement. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Ex parte acts by arbitrators con-

stitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Misconduct of Arbitrators Shown. — Appellants sufficiently met their heavy burden under this section in demonstrating arbitrator's misconduct, where the evidence showed that during the arbitration of a construction contract dispute, the arbitration panel collectively harassed and badgered witness and appellant's attorney, refused to hear evidence, and constantly used profanity and sarcastic comments during the proceedings. Wildwoods of Lake Johnson Assocs. v. L.P. Cox Co., 88 N.C. App. 88, 362 S.E.2d 615 (1987), cert. denied, 322 N.C. 838, 371 S.E.2d 285 (1988).

Misconduct of Arbitrators Not Shown. — Defendants failed to carry their burden of proving that an arbitrator was partial, corrupt or acted in a way constituting misconduct, thus prejudicing the rights of defendants, when he made a casual remark to a witness outside the hearing room. Creative Homes & Millwork, Inc. v. Hinkle, 109 N.C. App. 259, 426 S.E.2d 480 (1993).

What Errors May Be Corrected on Review. — Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Where a motion to vacate is granted, the determination of a motion to confirm an award is rendered moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

The vacating of an arbitration award does not deny a motion to confirm, but renders the consideration of an application to confirm moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in subsection (b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in § 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since subsection (b) was the statute of limitations most analogous for the determination of timeliness. In re Gencorp, Inc., 622 F. Supp. 216 (W.D.N.C. 1985).

Confirmation of Arbitration Award Prior to 90 Day Period. — There was no error in trial court's granting defendant's motion to confirm an arbitration award prior to the expiration of the 90-day period prescribed in this section. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Award Contrary to Contract. — Arbitrators' decision to award interest at 8% per diem was inconsistent with the parties' contract. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Cited in Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992).

§ 1-567.14. Modification or correction of award.

CASE NOTES

This section and § 1-567.13 provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987); Sentry Bldg. Sys. v. Onslow County Bd. of Educ., 116 N.C. App. 442, 448 S.E.2d 145 (1994).

Section 1-567.13 provides the exclusive grounds and procedure for vacating an award while this section provides the exclusive grounds and procedure for modifying or correcting an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Strict Compliance with Notice Procedure is Required. — As § 1-567.9 is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by § 1-567.13. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Both this section and § 1-567.13 establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Errors of Law or Fact, etc. —

In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

What Errors May Be Corrected on Review. — Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Court May Not Add Attorneys' Fees Not Contained in Award. — There is no provision or authority in this section or elsewhere in the Uniform Arbitration Act allowing a court to increase an award by adding attorneys' fees not contained in the award. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the North Carolina Uniform Arbitration Act (§§ 1-567.1 through 1-567.20) and hence of the arbitration agreement. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Ex parte acts by arbitrators constitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

When Fairness or Regularity, etc.—

In accord with original. See In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and the parties, who have agreed to abide by the decision of the arbitrators, will not generally be heard to attack the regularity or fairness of an award. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Burden of Proving Invalidity of Award. — An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

§ 1-567.15. Judgment or decree on award.

CASE NOTES

The scope of an arbitration award and its res judicata effect are matters for judicial determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment. Thus, a judgment entered on an arbitration award is conclusive of all rights, questions, and facts in issue, as to the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

And Judgment Operates as an Estoppel. — A judgment entered on an arbitration award, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

§ 1-567.16. Applications to court.

CASE NOTES

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Failure to Apply for Arbitration. — Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under § 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Cited in County of Durham v. Richards & Assocs., 742 F.2d 811 (4th Cir. 1984).

§ 1-567.17. Court; jurisdiction.

CASE NOTES

When a cause of action has arisen, etc. —

Application by defendants to the court for arbitration pursuant to § 1-567.3 would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act (§§ 1-567.1 through 1-567.20), and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

§ 1-567.18. Appeals.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Legislative Intent. — The Legislature did not intend for an appeal to lie from an arbitration order which vacates an award, but directs a rehearing. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

No Right to Appeal from Denial of Application to Stay Arbitration. — This section does not permit an appeal to be taken from the denial of an application to stay arbitration. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Determination As to Existence of Enforceable Contract Must Be Made. — Where the trial court had not yet summarily determined the issue of whether the parties had entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration was not appealable. Lee County Bd. of Educ. v. Adams Elec., Inc., 106 N.C. App. 139, 415 S.E.2d 576 (1992).

Stated in Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984); Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991).

Cited in City of Statesville v. Gilbert Eng'g Co., 68 N.C. App. 676, 316 S.E.2d 115 (1984).

§ 1-567.19. Article not retroactive.

CASE NOTES

Cited in Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992).

§ 1-567.20. Uniformity of interpretation.

CASE NOTES

Applied in Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

§§ 1-567.21 through 1-567.29: Reserved for future codification purposes.

ARTICLE 45B.

International Commercial Arbitration.

§ 1-567.30. Preamble and short title.

It is the policy of the State of North Carolina to promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein. Pursuant to this policy, the purpose of this Article is to encourage the use of arbitration as a means of resolving such disputes, to provide rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for legal proceedings ancillary to such arbitration. This Article shall be known as the North Carolina International Commercial Arbitration Act. (1991, c. 292, s. 1.)

Editor's Note. — Session Laws 1991, c. 292, s. 2 makes this Article effective upon ratification. The act was ratified June 13, 1991.

The enacting clause for this Article states: "Article 45 of Chapter 1 of the General Statutes is amended by adding a new Article to read:".

§ 1-567.31. Scope of application.

(a) This Article applies to international commercial arbitration, subject to any applicable international agreement in force between the United States of America and any other nation or nations, or any federal statute.

(b) The provisions of this Article except G.S. 1-567.38 and G.S. 1-567.39, apply only if the place of arbitration is in this State.

(c) An arbitration is international if:

(1) The parties to the arbitration agreement have their places of business in different nations when the agreement is concluded; or

(2) One or more of the following places is situated outside the nations in which the parties have their places of business:

a. The place of arbitration if determined pursuant to the arbitration agreement;

b. Any place where a substantial part of the obligations of the commercial relationship is to be performed; or

c. The place with which the subject matter of the dispute is most closely connected; or

(3) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one nation.

(d) For the purposes of subsection (c) of this section:

(1) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(2) If a party does not have a place of business, reference is to be made to the party's domicile.

(e) An arbitration is deemed commercial for the purposes of this Article if it arises out of a relationship of a commercial nature, including, but not limited to the following:

(1) A transaction for the exchange of goods and services;

(2) A distribution agreement;

(3) A commercial representation or agency;

(4) An exploitation agreement or concession;

(5) A joint venture or other related form of industrial or business cooperation;

(6) The carriage of goods or passengers by air, sea, land, or road;

(7) A contract or agreement relating to construction, insurance, licensing, factoring, leasing, consulting, engineering, financing, or banking;

(8) The transfer of data or technology;

(9) The use or transfer of intellectual or industrial property, including trade secrets, trademarks, trade names, patents, copyrights, and software programs;

(10) A contract for the provision of any type of professional service, whether provided by an employee or an independent contractor.

(f) This Article shall not affect any other law in force by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Article.

(g) This Article shall not apply to any agreement providing explicitly that it shall not be subject to the North Carolina International Commercial Arbitration Act. This Article shall not apply to any agreement executed prior to June 13, 1991. (1991, c. 292, s. 1.)

§ 1-567.32. Definitions and rules of interpretation.

(a) For the purposes of this Article:

(1) "Arbitral award" means any decision of an arbitral tribunal on the substance of a dispute submitted to it, and includes an interlocutory, or partial award;

(2) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(3) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(4) "Party" means a party to an arbitration agreement;

(5) "Superior court" means the superior court of any county in this State selected pursuant to G.S. 1-567.36.

(b) Where a provision of this Article, except G.S. 1-567.58, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

(c) Where a provision of this Article refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

(d) Where a provision of this Article, other than in G.S. 1-567.55(1) and G.S. 1-567.62(b)(1), refers to a claim, it also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to such counterclaim. (1991, c. 292, s. 1.)

§ 1-567.33. Receipt of written communications or submissions.

(a) Unless otherwise agreed by the parties, any written communication or submission is deemed to have been received if it is delivered to the addressee personally or if it is delivered at the addressee's place of business, domicile or mailing address and the communication or submission is deemed to have been received on the day it is so delivered. Delivery by facsimile transmission shall constitute valid receipt if the communication or submission is in fact received.

(b) If none of the places referred to in subsection (a) can be found after making reasonable inquiry, a written communication or submission is deemed to have been received if it is sent to the addressee's last known place of business, domicile or mailing address by registered mail or any other means which provide a record of the attempt to deliver it.

(c) The provisions of this Article do not apply to a written communication or submission relating to a court, administrative or special proceeding. (1991, c. 292, s. 1.)

§ 1-567.34. Waiver of right to object.

A party who knows that any provision of this Article or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating an objection to such noncompliance without undue delay or, if a time limit is provided therefor, within that period of time, shall be deemed to have waived any right to object. (1991, c. 292, s. 1.)

§ 1-567.35. Extent of court intervention.

In matters governed by this Article, no court shall intervene except where so provided in this Article or applicable federal law or any applicable international agreement in force between the United States of America and any other nation or nations. (1991, c. 292, s. 1.)

§ 1-567.36. Venue and jurisdiction of courts.

(a) The functions referred to in G.S. 1-567.41(c) and (d), 1-567.43(a), 1-567.44(b), 1-567.46(c), and 1-567.57 shall be performed by the superior court in:

(1) The county where the arbitration agreement is to be performed or was made;
(2) If the arbitration agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in the State of North Carolina, the county where any party to the court proceeding resides or has a place of business;
(3) In any case not covered by subdivisions (1) or (2) of this subsection, in any county in the State of North Carolina.

(b) All other functions assigned by this Article to the superior court shall be performed by the superior court of the county in which the place of arbitration is located. (1991, c. 292, s. 1.)

§ 1-567.37. Definition and form of arbitration agreement.

(a) An "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether or not contractual. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(b) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, facsimile transmission, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

(c) Such arbitration agreement shall be valid, enforceable and irrevocable, except with the consent of all the parties, without regard to the justiciable character of the controversy. (1991, c. 292, s. 1.)

§ 1-567.38. Arbitration agreement and substantive claim before court.

(a) When a party to an international commercial arbitration agreement as defined in this Article commences judicial proceedings seeking relief with respect to a matter covered by the agreement to arbitrate, any other party to the agreement may apply to the superior court for an order to stay the proceedings and compel arbitration.

(b) Arbitration proceedings may begin or continue, and an award may be made, while an action described in subsection (a) is pending before the court. (1991, c. 292, s. 1.)

§ 1-567.39. Interim relief and the enforcement of interim measures.

(a) In the case of an arbitration where the arbitrator or arbitrators have not been appointed, or where the arbitrator or arbitrators are unavailable, a party may seek interim relief directly from the superior court as provided in subsection (c). Enforcement shall be granted as provided by the law applicable to the type of interim relief sought.

(b) In all other cases, a party shall seek interim measures under G.S. 1-567.47 from the arbitral tribunal and shall have no right to seek interim relief from the superior court, except that a party to an arbitration governed by this Article may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures under G.S. 1-567.47.

(c) In connection with an agreement to arbitrate or a pending arbitration, the superior court may grant, pursuant to subsection (a) of this section:

(1) An order of attachment of garnishment;
(2) A temporary restraining order or preliminary injunction;
(3) An order for claim and delivery;
(4) The appointment of a receiver;
(5) Delivery of money or other property into court;
(6) Any other order that may be necessary to ensure the preservation or availability either of assets or of documents, the destruction or absence of which would be likely to prejudice the conduct or effectiveness of the arbitration.

(d) In considering a request for interim relief or the enforcement of interim measures, the court shall give preclusive effect to any finding of fact of the arbitral tribunal in the proceeding, including the probable validity of the claim that is the subject of the interim relief sought or the interim measures granted.

(e) Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim relief or the enforcement of interim measures shall be denied. Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceedings.

(f) The availability of interim relief under this section may be limited by prior written agreement of the parties. (1991, c. 292, s. 1.)

§ 1-567.40. Number of arbitrators.

There shall be one arbitrator unless the parties agree on a greater number of arbitrators. (1991, c. 292, s. 1.)

§ 1-567.41. Appointment of arbitrators.

(a) A person of any nationality may be an arbitrator.

(b) The parties may agree on a procedure of appointing the arbitral tribunal subject to the provisions of subsections (d) and (e) of this section.

(c)(1) If an agreement is not made under subsection (b) of this section, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the superior court.

(2) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, a sole arbitrator shall be appointed, upon request of a party, by the superior court.

(3) In an arbitration involving more than two parties, if no agreement is reached under subsection (b) of this section, the superior court, on request of a party, shall appoint one or more arbitrators, as provided in G.S. 1-567.40.

(d) The superior court, on request of any party, may take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment, if, under an appointment procedure agreed upon by the parties:

(1) A party fails to act as required under such procedure; or

(2) The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(3) A third party, including an institution, fails to perform any function entrusted to it under such procedure.

(e) A decision of the superior court on a matter entrusted by subsection (c) or (d) of this section shall be final and not subject to appeal.

(f) The superior court, in appointing an arbitrator, shall consider:

(1) Any qualifications required of the arbitrator by the agreement of the parties;

(2) Such other considerations as are likely to secure the appointment of an independent and impartial arbitrator;

(3) In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

(g) The parties may agree to employ an established arbitration institution to conduct the arbitration. If they do not so agree, the superior court may in its discretion designate an established arbitration institution to conduct the arbitration.

(h) Unless otherwise agreed, an arbitrator shall be entitled to compensation at an hourly or daily rate which reflects the size and complexity of the case, and the experience of the arbitrator. If the parties are unable to agree on such a rate, the rate shall be determined by the arbitral institution chosen pursuant to subsection (g) of this section or by the arbitral tribunal, in either case subject to the review of the superior court upon the motion of any dissenting party. (1991, c. 292, s. 1; 1993, c. 553, s. 6.)

§ 1-567.42. Grounds for challenge.

(a) Except as otherwise provided in this Article, all persons whose names have been submitted for consideration for appointment or designation as arbitrators, or who have been appointed or designated as such, shall make a disclosure to the parties within 15 days of such submission, appointment, or designation of any information which might cause their impartiality to be questioned including, but not limited to, any of the following instances:

(1) The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or has been a material witness concerning it;

(3) The person served as an arbitrator in another proceeding involving one or more of the parties to the proceeding;

(4) The person, individually or as a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:
   a. The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;
   b. The person is acting or has acted as a lawyer in the proceeding;
   c. The person is known to have an interest that could be substantially affected by the outcome of the proceeding;
   d. The person is likely to be a material witness in the proceeding;

(6) The person has a close personal or professional relationship with a person who meets any of the following conditions:
   a. The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;
   b. The person is acting or has acted as a lawyer or representative in the proceeding;
   c. The person is or expects to be nominated as an arbitrator or conciliator in the proceeding;
   d. The person is known to have an interest that could be substantially affected by the outcome of the proceeding;

e. The person is likely to be a material witness in the proceeding.

(b) The obligation to disclose information set forth in subsection (a) of this section is mandatory and cannot be waived as to the parties with respect to persons serving either as sole arbitrator or as the chief or prevailing arbitrator. The parties may otherwise agree to waive such disclosure.

(c) From the time of appointment and throughout the arbitral proceedings, an arbitrator shall disclose to the parties without delay any circumstances referred to in subsection (a) of this section which were not previously disclosed.

(d) Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed.

(e) A party may challenge an arbitrator appointed by it, or in whose appointment it has participated only for reasons of which it becomes aware after the appointment has been made. (1991, c. 292, s. 1.)

§ 1-567.43. Challenge procedure.

(a) The parties may agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (c) of this section.

(b) If there is no agreement under subsection (a) of this section, a party challenging an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in G.S. 1-567.42(a), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(c) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (b) of this section is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the superior court to decide on the challenge, which decision shall be final and subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue to conduct the arbitral proceedings and make an award. (1991, c. 292, s. 1.)

§ 1-567.44. Failure or impossibility to act.

(a) The mandate of an arbitrator terminates if the arbitrator becomes unable to perform the arbitrator's functions or for other reasons fails to act without undue delay or the arbitrator withdraws or the parties agree to the termination.

(b) If a controversy remains concerning any of the grounds referred to in subsection (a) of this section, a party may request the superior court to decide on the termination of the mandate. The decision of the superior court shall be final and not subject to appeal.

(c) If under this section or under G.S. 1-567.43, an arbitrator withdraws or otherwise agrees to the termination of his or her mandate, no acceptance of the validity of any ground referred to in this section or G.S. 1-567.43(b) shall be implied in consequence of such action. (1991, c. 292, s. 1.)

§ 1-567.45. Appointment of substitute arbitrator.

(a) Where the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(b) Unless otherwise agreed by the parties:

(1) Where the number of arbitrators is less than three and an arbitrator is replaced, any hearings previously held shall be repeated;

(2) Where the presiding arbitrator is replaced, any hearings previously held shall be repeated;

(3) Where the number of arbitrators is three or more and an arbitrator other than the presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(c) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid because there has been a change in the composition of the tribunal. (1991, c. 292, s. 1.)

§ 1-567.46. Competence of arbitral tribunal to rule on its jurisdiction.

(a) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause, unless the arbitral tribunal finds that the arbitration clause was obtained by fraud, whether in the inducement or in the factum.

(b) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. In either case, the arbitral tribunal may admit a later plea if it considers the delay justified.

(c) The arbitral tribunal may rule on a plea referred to in subsection (b) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, after having received notice of that ruling, any party may request the superior court to decide the matter. The decision of the superior court shall be final and not subject to appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. (1991, c. 292, s. 1.)

§ 1-567.47. Power of arbitral tribunal to order interim measures.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, including an interim measure analogous to any type of interim relief specified in G.S. 1-567.39(c). The arbitral tribunal may require any party to provide appropriate security, including security for costs as provided in G.S. 1-567.61(h)(2), in connection with such measure. (1991, c. 292, s. 1.)

§ 1-567.48. Equal treatment of parties.

The parties shall be treated with equality and each party shall be given a full opportunity to present its case. (1991, c. 292, s. 1.)

§ 1-567.49. Determination of rules of procedure.

(a) Subject to the provisions of this Article, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(b) If there is no agreement under subsection (a) of this section, the arbitral tribunal may, subject to the provisions of this Article, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to order such discovery as it deems necessary and to determine the admissibility, relevance, materiality, and weight of any evidence. Evidence need not be limited by the rules of evidence applicable in judicial proceedings, except as to immunities and privilege. Each party shall have the burden of proving the facts relied on to support its claim, setoff, or defense. (1991, c. 292, s. 1.)

§ 1-567.50. Place of arbitration.

(a) The parties may agree on the place of arbitration. If the parties do not agree, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(b) Notwithstanding the provisions of subsection (a) of this section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents. (1991, c. 292, s. 1.)

§ 1-567.51. Commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. (1991, c. 292, s. 1.)

§ 1-567.52. Language.

(a) The parties may agree on the language or languages to be used in the arbitral proceedings. If the parties do not agree, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision, or other communication by the arbitral tribunal.

(b) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

(c) The arbitral tribunal may employ one or more translators at the expense of the parties. (1991, c. 292, s. 1.)

§ 1-567.53. Statements of claim and defense.

(a) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting its claim, the points at issue and the relief or remedy sought, and the respondent shall state its defenses and counterclaims or setoffs in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence the party will submit.

(b) Unless otherwise agreed by the parties, either party may amend or supplement a claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

(c) If there are more than two parties to the arbitration, each party shall state its claims, setoffs, and defenses as provided in subsection (a) of this section. (1991, c. 292, s. 1.)

§ 1-567.54. Hearings and written proceedings.

(a) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property, or documents.

(c) All statements, documents, or other information supplied to the arbitral tribunal by one party shall be served on the other party and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be served on the parties. The arbitral tribunal shall direct the timing of such service to protect the parties from undue surprise.

(d) Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera. Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by the arbitrator or arbitrators. Unless otherwise agreed by the parties, or required by applicable law, the arbitral tribunal and the parties shall keep confidential all matters relating to the arbitration and the award.

(e) The parties may agree on:

(1) The attendance of a court reporter,

(2) The creation of a transcript of proceedings, or

(3) The making of an audio or video record of proceedings, at the expense of the parties.

Any party may provide for any of the actions specified in subdivisions (1) through (3) of this subsection at that party's own expense.

(f) After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or being satisfied that the record is complete, the arbitral tribunal may declare the hearings closed. The arbitral tribunal may reopen the hearings, upon terms it considers just, at any time before the award is made. (1991, c. 292, s. 1.)

§ 1-567.55. Default of a party.

Unless otherwise agreed by the parties, where, without showing sufficient cause:

(1) The claimant fails to submit a statement of claim in accordance with G.S. 1-567.53(a), the arbitral tribunal shall terminate the proceedings;

(2) The respondent fails to submit a statement of defense in accordance with G.S. 1-567.53(c), the arbitral tribunal shall continue to conduct the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(3) Any party fails to appear at a hearing or to produce documentary evidence as directed by the arbitral tribunal, the arbitral tribunal may continue to conduct the proceedings and make the award on the evidence before it. (1991, c. 292, s. 1.)

§ 1-567.56. Expert appointed by arbitral tribunal.

(a) Unless otherwise agreed by the parties, the arbitral tribunal:

(1) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(2) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(b) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to question the expert and to present expert witnesses on the points at issue. (1991, c. 292, s. 1.)

§ 1-567.57. Court assistance in obtaining discovery and taking evidence.

(a) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the superior court assistance in obtaining discovery and taking evidence. The court may execute the request within its competence and according to its rules on discovery and taking evidence, and may impose sanctions for failure to comply with its orders. A subpoena may be issued as provided by G.S. 8-59, in which case the witness compensation provisions of G.S. 6-51, 6-53, and 7A-314 shall apply.

(b) If the parties to two or more arbitration agreements agree, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those agreements, the superior court, on application by one party with the consent of all the other parties to those arbitration agreements, may:

(1) Order the arbitrations to be consolidated on terms the court considers just and necessary;

(2) If all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal as provided by G.S. 1-567.41; and

(3) If all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary. (1991, c. 292, s. 1.)

§ 1-567.58. Rules applicable to substance of dispute.

(a) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given country or political subdivision thereof shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country or political subdivision and not to its conflict of laws rules.

(b) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(c) The arbitral tribunal shall decide ex aequo et bono (on the basis of fundamental fairness), or as amiable compositeur (as an "amicable compounder"), only if the parties have expressly authorized it to do so.

(d) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. (1991, c. 292, s. 1; c. 761, s. 1.)

§ 1-567.59. Decision making by panel of arbitrators.

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, is authorized by the parties or all members of the arbitral tribunal. (1991, c. 292, s. 1.)

§ 1-567.60. Settlement.

(a) An arbitral tribunal may encourage settlement of the dispute and, with the agreement of the parties, may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.

(b) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(c) An award on agreed terms shall be made in accordance with the provisions of G.S. 1-567.61 and shall state that it is an arbitral award. Such an award shall have the same status and effect as any other award on the substance of the dispute. (1991, c. 292, s. 1.)

§ 1-567.61. Form and contents of award.

(a) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(b) The award shall not state the reasons upon which it is based, unless the parties have agreed that reasons are to be given.

(c) The award shall state its date and the place of arbitration as determined in accordance with G.S. 1-567.50. The award shall be considered to have been made at that place.

(d) After the award is made, a copy signed by the arbitrator or arbitrators in accordance with subsection (a) of this section shall be delivered to each party.

(e) The award may be denominated in foreign currency, by agreement of the parties or in the discretion of the arbitral tribunal if the parties are unable to agree.

(f) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

(g) The arbitral tribunal may award specific performance in its discretion to a party requesting an award of specific performance.

(h)(1) Unless otherwise agreed by the parties, the awarding of costs of an arbitration shall be at the discretion of the arbitral tribunal.

(2) In making an order for costs, the arbitral tribunal may include as costs:

a. The fees and expenses of the arbitrator or arbitrators, expert witnesses, and translators;
b. Fees and expenses of counsel and of the institution supervising the arbitration, if any; and
c. Any other expenses incurred in connection with the arbitral proceedings.

(3) In making an order for costs, the arbitral tribunal may specify:

a. The party entitled to costs;
b. The party who shall pay the costs;
c. The amount of costs or method of determining that amount; and
d. The manner in which the costs shall be paid. (1991, c. 292, s. 1.)

§ 1-567.62. Termination of proceedings.

(a) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection (b) of this section.

(b) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings if:

(1) The claimant withdraws the claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;

(2) The parties agree on the termination of the proceedings; or

(3) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(c) Subject to the provisions of G.S. 1-567.63, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. (1991, c. 292, s. 1.)

§ 1-567.63. Correction and interpretation of awards; additional awards.

(a) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties:

(1) A party may request the arbitral tribunal to correct in the award any computation, clerical or typographical errors or other errors of a similar nature;

(2) A party may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers such request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Such correction or interpretation shall become part of the award.

(b) The arbitral tribunal may correct any error of the type referred to in subsection (a) of its own initiative within 30 days of the date of the award.

(c) Unless otherwise agreed by the parties, within 30 days of receipt of the award, a party may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days after the date of receipt of the request.

(d) The arbitral tribunal may extend, if necessary, the period within which it shall make a correction interpretation, or an additional award under subsection (a) or (c).

(e) The provisions of G.S. 1-567.61 shall apply to a correction or interpretation of the award or to an additional award made under this section. (1991, c. 292, s. 1.)

§ 1-567.64. Modifying or vacating of awards.

Subject to the relevant provisions of federal law or any applicable international agreement in force between the United States of America and any other nation or nations, an arbitral award may be vacated by a court only upon a showing that the award is tainted by illegality, or substantial unfairness in the conduct of the arbitral proceedings. In determining whether an award is so tainted, the superior court shall have regard to the provisions of this Article, and of G.S. 1-567.13 and G.S. 1-567.14, but shall not engage in de novo review of the subject matter of the dispute giving rise to the arbitration proceedings. (1991, c. 292, s. 1.)

§ 1-567.65. Confirmation and enforcement of awards.

Subject to the relevant provisions of federal law or any applicable international agreement in force between the United States of America and any other nation or nations, upon application of a party, the superior court shall confirm an arbitral award, unless it finds grounds for modifying or vacating the award under G.S. 1-567.64. An award shall not be confirmed unless the time for correction and interpretation of awards prescribed by G.S. 1-567.63 shall have expired or been waived by all the parties. Upon the granting of an order confirming, modifying, or correcting an award, judgment or decree shall be entered in conformity therewith and enforced as any other judgment or decree. The superior court may award costs of the application and of the subsequent proceedings. (1991, c. 292, s. 1.)

§ 1-567.66. Applications to superior court.

Except as otherwise provided, an application to the superior court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1991, c. 292, s. 1.)

§ 1-567.67. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under G.S. 1-567.38;

(2) An order granting an application to stay arbitration made under G.S. 1-567.38;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this Article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1991, c. 292, s. 1.)

§ 1-567.68. Severability.

In the event any provision of this act is held to be invalid, the court's holding as to that provision shall not affect the validity or operation of other provisions of the act; and to that end the provisions of the act are severable. (1991, c. 292, s. 1.)

ARTICLE 50.

General Provisions as to Legal Advertising.

§ 1-596. Charges for legal advertising.

The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1919, c. 45, ss. 1, 2; C.S., s. 2586; 1945, c. 635; 1949, c. 205, s. 1½; 1993, c. 539, s. 3; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the second paragraph inserted "Class 1" preceding "misdemeanor".

OPINIONS OF ATTORNEY GENERAL

Legal advertisements published in a newspaper which failed to file the rate schedule required by this section are not invalidated because of the failure to file. See opinion of Attorney General to Grady Joseph Wheeler, Jr., City Attorney, Graham, North Carolina, 54 N.C.A.G. 36 (1985).

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second-class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by G.S. 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of G.S. 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of G.S. 1-597 to 1-599. This provision shall be retroactive to May 1, 1940, and all publications, advertisements and notices published in accordance with this provision since May 1, 1940, are hereby validated.

Notwithstanding the provisions of G.S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section. (1939, c. 170, s. 1; 1941, c. 96; 1959, c. 350; 1985, c. 689, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 41.)

CASE NOTES

Liability for Failure to Comply with This Section. — Where attorneys filed a notice of foreclosure in a newspaper, not in compliance with this section, the failure to find and follow this section was not negligence as a matter of law. Haas v. Warren, 112 N.C. App. 574, 436 S.E.2d 259 (1993), cert. granted, 336 N.C. 72, 445 S.E.2d 33 (1994).

Cited in County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

§ 1-599. Application of two preceding sections.

The provisions of G.S. 1-597 and G.S. 1-598 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by G.S. 1-597; nor shall the provisions of G.S. 1-597 and G.S. 1-598 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed in G.S. 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49; 1985, c. 609, s. 1.)

Local Modification. — Towns of Mint Hill and Mathews: 1987 (Reg. Sess., 1988), c. 1042, s. 5.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1995

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

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MICHAEL F. EASLEY

Attorney General of North Carolina